69826

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 138.

THE GRAND TRUNK WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE, AND THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

IN ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

FILED JANUARY 26, 1909.

(21,497.)

MINN. STATE LIBRARY
DEC 22 1911
ST. PAUL

(21,497.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 138.

THE GRAND TRUNK WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE, AND THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

IN ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

INDEX.

	Original.	Print
Caption	1	1
Transcript from Lake circuit court	2	1
Caption	2	2
Original complaint filed	2	2
Demurrer of Railroad Commission to original complaint filed	3	2
Demurrer to original complaint by Railroad Commission	3	2
Demurrers of Union B. Hunt, C. V. McAdams, and Wm. J. Wood to original complaint filed	4	3
Demurrer of Union B. Hunt to original complaint	4	3
Demurrer of C. V. McAdams to original complaint	5	3
Demurrer of Wm. J. Wood to original complaint	5	4
Demurrers confessed	6	4
Amended complaint filed	6	4
Amended complaint	7	5
Separate demurrers filed	21	13
Demurrer of Railroad Commission of Indiana	21	13
Demurrer of Union B. Hunt	22	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1910.

	Original.	Print
Demurrer of Charles V. McAdams	22	14
Demurrer of William J. Wood	23	14
Motion to dismiss filed	23	14
Motion to dismiss	24	14
Motion to dismiss overruled	25	15
Demurrer by Chicago, Indianapolis & Louisville Ry. Co. filed	25	15
Demurrer of Chicago, Indianapolis & Louisville Ry. Co.	25	15
Demurrer of each defendant sustained	26	16
Judgment	26	16
Appeal prayed	26	16
Appeal granted	26	16
Appeal bond filed	26	16
Appeal bond	27	17
Præcipe for transcript	28	18
Clerk's certificate	29	18
Assignment of errors	30	19
Order of submission	31	19
Brief for appellant filed	31	20
Brief for C., I. & L. Ry. Co. filed	31	20
Brief for Railroad Commission filed	32	20
Petition to advance filed	32	20
Order advancing cause	32	20
Order transferring cause to appellate court	33	21
Opinion by Monks, J., transferring cause	33	21
Order for judgment by appellate court	34	21
Opinion of appellate court by Rabb, J	34	22
Judgment of appellate court	46	28
Petition for writ of error filed	47	29
Petition for writ of error	48	29
Order allowing writ of error	55	33
Writ of error filed	57	34
Writ of error	58	34
Order filing bond, &c	59	34
Bond on writ of error	60	35
Order filing citation	62	36
Citation and service	63	36
Citation and service	64	37
Order filing assignment of errors	65	37
Assignment of errors	66	38
Clerk's certificate to transcript of record	71	40

1 STATE OF INDIANA:

In the Supreme Court.

No. 20769.

GRAND TRUNK WESTERN RY. CO.
v.
UNION B. HUNT et al.

Appealed from Lake Circuit Court.

Be it remembered: That heretofore, to-wit: On the 27th day of January, 1906, the same being the 54th Judicial Day of the November Term, 1905, of the Supreme Court of Indiana, The Grand Trunk Western Railway Company, by Anderson, Du Shane and Crabill, its attorneys, filed in the office of the Supreme Court of Indiana a transcript of the record and proceedings of the Lake Circuit Court of Lake County, Indiana, in a cause wherein the Grand Trunk Western Railway Company was plaintiff, and Union B. Hunt, C. V. McAdams, and William J. Wood, the Railroad Commission of Indiana, and the Chicago, Indianapolis & Louisville Railway Company were defendants, together with an assignment of errors endorsed thereon, which said cause was filed in said Court as an In Term appeal, and which said transcript and assignment of errors are in the words and figures following, to-wit:

2 In the Supreme Court.

GRAND TRUNK WESTERN RY. CO.
vs.
STATE OF INDIANA.

Appeal to Supreme Court.

STATE OF INDIANA,
County of Lake, ss:

In the Lake Circuit Court, November Term, 1905.

Pleas and Proceedings at a Regular Term of the Circuit Court Within and for the County of Lake, in the State of Indiana, Begun, Held, and Continued at the Court House, in Crown Point, in said County, Commencing on Monday, November 20th, 1905, before the Honorable Willis C. McMahan, Sole Presiding Judge Thereof.

Present in Attendance:

Honorable Willis C. McMahan, Judge.
David E. Boone, Esq., Prosecuting Attorney.
Charles J. Daugherty, Sheriff.
Attest:

HAROLD H. WHEELER, *Clerk.*

No. 6952.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
UNION B. HUNT, C. V. MCADAMS, and WILLIAM J. WOOD, the Railroad Commission of Indiana.

Complaint Filed.

Be it remembered, That on July 11th, 1905, the plaintiff in the above entitled cause, by Anderson, Du Shane & Crabill, its attorneys, filed in the Office of the Clerk of the Lake Circuit Court, its Petition herein, but an amended Petition having afterwards been filed herein, the original Petition is here omitted.

3 And afterwards, to-wit: On September 5th, 1905, the same being the Second judicial day of the September term, 1905, of said court, the following among other proceedings were by said court had and entered of record in said cause:

No. 6952.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT, C. V. MCADAMS, and WILLIAM J. WOOD, the Railroad Commission of Indiana.

Demurrer to Original Complaint by R. R. Commission.

Come now the parties hereto by their respective attorneys, and the defendant, the Railroad Commission of Indiana, files its demurrer to the Complaint herein, which demurrer is in the words and figures following, to-wit:

Demurrer.

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
RAILROAD COMMISSION OF INDIANA et al.

Demurrer of R. R. Commission to Original Complaint.

The defendant, Railroad Commission of Indiana, demurs to the plaintiff's complaint and for cause says: That the plaintiff's com-

plaint does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in this: that the Chicago, Indianapolis and Louisville Railway Company is a necessary party defendant and should be joined as such. Wherefore, etc.

C. M. McADAMS,
Attorney for Defendant.

4 *Demurrers to Original Complaint Filed by Union B. Hunt, C. V. McAdams, Wm. J. Wood.*

And each of the other defendants, namely: Union B. Hunt, C. V. McAdams and William J. Wood files his separate demurrer to said complaint, which said demurrers are in the words and figures following, to-wit:

Demurrer.

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Demurrer of Union B. Hunt to Original Complaint.

The defendant, Union B. Hunt, demurs to the plaintiff's complaint and for cause says:

First. That the plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in this: that the Chicago, Indianapolis and Louisville Railway Company is a necessary party defendant and should be joined as such. Wherefore, etc.

C. V. McADAMS,
Attorney for Defendant.

5 Demurrer.

STATE OF INDIANA,
Lake County, ss:

In Lake Circuit Court.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
CHARLES V. McADAMS et al.

Demurrer of McAdams to Original Complaint.

The defendant, Charles V. McAdams, demurs to the plaintiff's complaint and for cause says:

First. That the plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in this: that the Chicago, Indianapolis and Louisville Railway Company is a necessary party defendant and should be joined as such. Wherefore, etc.

CHAS. V. McADAMS, *Defendant.*

Demurrer.

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
WILLIAM J. WOOD et al.

Demurrer of Wm. J. Wood to Original Complaint.

The defendant, William J. Wood, demurs to the plaintiff's complaint and for cause says:

First. That the plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in this: that the Chicago, Indianapolis and Louisville Railway Company
6 is a necessary party defendant and should be joined as such. Wherefore, etc.

C. V. McADAMS,
Attorney for Defendant.

Demurrers Confessed.

And thereupon the plaintiff confesses demurrer and is given leave to amend its complaint within ten days.

And afterwards, to-wit: On September 14th, 1905, the same being the Tenth judicial day of the September Term, 1905, of said court, the following further proceedings were by said court had and entered of record in said cause, to-wit:

No. 6952.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Amended Complaint Filed.

Come again the parties appearing by counsel, and the plaintiff now files its amended complaint herein, making the Chicago, In-

dianapolis and Louisville Railway Company an additional party defendant, which amended complaint is in the words and figures following, to-wit:

7 *Amended Petition.*

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court, September Term, 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT, C. B. MCADAMS, WILLIAM J. WOOD, THE RAILroad Commission of Indiana, and The Chicago, Indianapolis & Louisville Railway Company.

Appealed from the Railroad Commission.

Amended Complaint.

To the Honorable the Judge of the Lake Circuit Court:

The Grand Trunk Western Railway Company, petitioning this court, represents:

That on the 4th day of May, 1905, the Chicago, Indianapolis & Louisville Railway Company, did file with the Railroad Commission of Indiana, its written petition in the words and figures following, to-wit:

"To the Railroad Commission of Indiana, Indianapolis, Ind.

GENTLEMEN: Your petitioners, the Chicago, Indianapolis & Louisville Railway Company, represent to your honorable Commission that it owns and operates a line of railroad from Indianapolis, Indiana, to Chicago, Ill., and also a line of railroad from New Albany, Indiana, to Chicago; and in Lake County, Indiana, its railroad crosses the railroad of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and also the railroad of the Grand Trunk Western Railway Company, at a point about four and one-half miles south of the city of Hammond, in said county and state; that said crossings are about fourteen hundred feet distant from each other; that both the Pittsburgh line and the Grand Trunk line are doing a very large business and are what are commonly denominated trunk lines for east and west business. That it is im-

8 portant for the safety of the traffic and the traveling public on all of said lines to have installed an interlocking plant at said crossings; that it is practicable to protect and operate both of said crossings with one interlocking plant; that your petitioner has been unable to agree with the other railroad companies herein mentioned on said matter, and it is therefore necessary for your Honorable Commission to determine the plan of said interlocker and to designate the proportion of the cost of the construction of such

plant and the maintenance and operation thereof, which each of said companies shall be required to pay. That your petitioner files herewith and makes a part hereof, a map showing said crossings; that in the opinion of your petitioner it will be necessary to establish the interlocking tower at a point midway between the two other named railroads on the right of *the* way of your petitioner, and that it will be proper and necessary for your petitioner to operate said interlocking plant, and that a proper division of the expenses of such operation must be determined by your honorable commission.

Respectfully submitted,

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,

By W. H. McDOEL, *President and General Manager.*"

And thereupon the said Railroad Commission did issue its summons directed to the Sheriff of Lake County, commanding him to notify the Grand Trunk Western Railway Company of the fact of the filing of said petition and of the fact that the Commission would view the site of such proposed interlocker on the 19th day of May, 1905, and after so viewing the same would hear said application in the City of Hammond in said County.

And your petitioner further represents that on the said 19th day of May, 1905, the said Grand Trunk Western Railway Com-
9 pany, which we will hereafter designate as the Grand Trunk Company, and the said Chicago, Indianapolis & Louisville Railway Company, which is generally known as the Monon Company, and which we will hereafter designate in this petition as the "Monon Company" and the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, which we will herein designate, as it is commonly called, the "Panhandle Railway Company" did all by their attorneys and agents appear before the said Commission and the said Commission did then proceed to examine the site of the said proposed crossing and did hear evidence relative to the *property* and necessity of establishing interlocking switches as requested by said petitioner, and did thereafter hear evidence and arguments addressed to the said Commission by the attorneys of all of said railroad companies, and the said Commission did on the 12th day of June, 1905, render its decision and make an order relative to the said crossing, which order is in the words and figures following, to-wit:

Commission's Order.

No. 1.

"CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Petitioner,
v.
GRAND TRUNK WESTERN RAILWAY COMPANY and THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Respondents.

Comes now the petitioner by E. C. Field, its attorney, and come the respondents by George E. Ross and Anderson, Du Shane and Crabill, their attorneys, and the Commission, after consideration of the briefs filed and being fully advised in the premises, now sustains the petition herein filed and orders thereon as follows:

That an interlocking device of some approved and modern manufacture be and the same is ordered to be installed at the crossing of the petitioner's railroad with the railroad of the respondent,
10 the Grand Trunk Western Railway Company, in Lake County, Indiana.

That an interlocking device of some approved and modern manufacture be and the same is ordered to be installed at the crossing of the petitioner's railroad with the railroad of the respondent, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, in Lake County, in this State.

It is further ordered that the Y connections and cross-over tracks of said several roads shall be included within such interlocking apparatus at the election only of the several roads as they may severally determine.

It is further ordered that complete plans of the devices to be used shall be presented to the Commission for approval before construction commences.

It is further ordered that the expenses of constructing and maintaining such device shall be divided between such railway companies upon the basis of functions of levers used in the operations of the plant for the benefit of the several roads respectively.

It is further ordered that the expenses of operation of the protecting device at the crossing of the Grand Trunk Western Railway Company's track shall be sustained by it and the petitioner upon the same basis as herein provided for expenses of construction and maintenance, excepting that the Commission orders that before any such division of the operating expenses shall be made the petitioner shall contribute and pay thereon the sum of $780.00 per annum, and the remaining expenses shall be so divided.

It is further ordered that the expenses of operation of the protecting device at the crossing of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company's track shall be sustained by
11 it and the petitioner upon the same basis as herein provided for expenses of construction and maintenance, excepting that

the Commission orders that before any such division of the operating expenses shall be made the said companies shall each contribute to and pay thereon the sum of Four Hundred and Fifty Dollars, per annum, and the remaining expenses shall then be divided on the basis aforesaid.

In case the tracks of either of such railroads shall hereafter be increased at the point of crossing, such interlocking device shall be improved so as to embrace and protect the additional tracks and the entire expense thereof shall be sustained by the company which lays down the additional tracks and the increased expense of maintenance shall likewise be sustained by such company and the expense of operation shall then be re-apportioned upon the basis of functions of levers after deducting the arbitrary heretofore mentioned, provided that no such addition shall be made to such plant until approved by the Commission.

Such interlocking devices shall be installed ready for use within ninety days next after this order becomes effective under the rules of the Commission.

The Secretary is ordered to tax as costs in this cause the sum of Fifty Dollars, being ten dollars per day for five days for the services of the Commission."

And your petitioner further avers that from the month of April, 1880, and until on or about the 2nd day of November, 1900, a certain railway company known as the Chicago & Grand Trunk Railway Company, owned the railroad now in possession of and operated by the said Grand Trunk Western Railway Company, and used the same in transporting *of* freight and passengers, and afterwards, on the 29th day of September, 1900, in a certain suit in equity pending in the District Court of the United States for the District of Indiana,

12 & 13

in which suit the Mercantile Trust Company of New York was plaintiff and the Chicago & Grand Trunk Railway Company was defendant, it was ordered that a certain mortgage executed by the said Grand Trunk Railway Company should be foreclosed and an order was made by said court directing that the said railway and all of the rights, privileges, franchises of the said Chicago & Grand Trunk Railway Company should be sold and conveyed for the purpose of paying the said mortgage debt; that thereafter an order of sale was issued from said court, directing the sale of said property, and thereafter and by virtue of the said order, a Master in Chancery, duly appointed in said cause, under and by virtue of the order in said court sold the said railroad of the Chicago & Grand Trunk Railway Company, together with all its rights and franchises, to Charles M. Hays and Elijah W. Meddaugh, and one Walter S. Harsha, a Special Commissioner appointed and authorized by said decree of foreclosure, did execute and deliver to said Hays and Meddaugh a deed conveying to them the said railroad and all the rights, privileges, and franchises of the said Chicago & Grand Trunk Railway Company; that afterwards on or about the 20th day of November, 1900, the said Hays and Meddaugh and others entered into Articles of Association, whereby they organized as a railroad company under and by virtue of the laws of the State of

Indiana, known as the Indiana and Illinois Railway Company, and the said Hays and Meddaugh did then execute and deliver to the said Indiana and Illinois Railway Company a deed conveying to the said Company the said railroad so purchased by them, together with all the rights, privileges and franchises of the said Chicago & Grand Trunk Railway Company; and thereafter, towit: On the 20th day of November, 1900, the said Indiana & Illinois Railway Company did associate and consolidate itself with another railroad company known as the Port Huron & Indiana Railway Company, thereby forming a new company under the name of the Grand Trunk
14 & Western Railway Company, whereby all of the railroad, rights, privileges, and franchises of the said Indiana & Illinois Railway Company were conveyed to and became the property of the Grand Trunk Western Railway Company, and that ever since the execution of said articles of association the Grand Trunk Western Railway Company has been and still is the owner of the said railroad described in the petition herein filed by the said Monon Company.

And your petitioner further avers: That in the fall of the year 1880, the exact date being unknown to your petitioner, a certain railroad company, known as the Chicago & Indianapolis Air Line Railroad Company contemplated building a railroad, which was the same railroad now owned and operated by said Monon Company, and had entered on the construction of said railroad and desired to obtain the right to build its road across the Grand Trunk Western at the Maynard Crossing, being the crossing mentioned in the petition originally filed herein; and thereupon the said Chicago & Grand Trunk Railway Company and the said Chicago & Indianapolis Air Line Railway Company executed a written contract in the words and figures following, to-wit:

"This agreement made and entered into near July, 16th, 188–, by and between the Chicago, & Grand Trunk Railway, party of the first part, and the Chicago & Indianapolis Air Line Railway, party of the second part, witnesseth.

"That the party of the first part for and in consideration of the performance by the party of the second part of the stipulations and agreements hereinafter set forth doth give and grant to the said party of the second part the right to construct and operate the said Chicago & Indianapolis Air Line Railway over and across the right-of-way of the said Chicago & Grand Trunk Railway at the
15 point where the said Chicago & Indianapolis Air Line Railway, as now located and in process of construction, shall cross the same at or near Maynard Station on the line of the said Chicago & Grand Trunk Railway, which said Railway *of* the party of the second part shall have constructed, kept and maintained at a grade on a level with the Railway of said party of the first part at the point of crossing as above specified herein.

And the said party of the second part in consideration of the right to construct and operate the said Chicago & Indianapolis Air Line Railway across the right-of-way of said party of the first part as

above granted and set forth agree- to construct, put in and maintain good and sufficient frogs and crossings at the points where the track of the said Chicago & Indianapolis Air Line Railway crosses the track of the Chicago & Grand Trunk Railway, as aforesaid, and should the party of the first part, at any time hereafter, construct and lay down additional track or tracks, at the said point of the intersection, the party of the second part agrees in like manner to construct, put in and maintain sufficient frogs and crossings to enable the party of the first part to cross the track or tracks of said second party's railway.

All of which crossings shall be put in at and upon the grade of the Railway of the party of the first part, and shall be done in a good and substantial manner, so that the party of the first part shall be able to operate its road at that point with convenience and safety, and that said crossings shall be so maintained and kept in repair by the party of the second part at its individual expense forever.

And the party of the second part further agrees that it will at said point of intersection, erect, put up and forever maintain good and substantial semaphores or other signals and provide the requisite watchmen to take charge of and operate the same all of which shall be at the individual expense of said party of the second
16 part.

In witness whereof the parties have hereunto set their hands *that* day and year first above written.

CHICAGO & GRAND TRUNK RY. CO.
(Signed) S. R. GALLOWAY, *Gen. Supt.*
CHICAGO & INDIANAPOLIS AIR LINE RY. CO.
(Signed) HENRY CRAWFORD, *G. M.*"

Your petitioner says that the said contract was signed by S. R. Galloway General Superintendent of the Chicago & Grand Trunk Railway Company, and by one Henry Crawford, who was then general manager of the Chicago & Indianapolis Air Line Company of which they were respectively general superintendent and general manager; that the said contract was ratified, approved, and confirmed by the said two railway companies and that the Chicago & Indianapolis Air Line Railway thereupon made said crossing and paid all the cost and expense thereof and did so thereafter as long as it continued to operate and manage said railroad; that at some time, the exact date of which is unknown to your petitioner, the said railroad so built and owned by the Chicago & Indianapolis Air Line Railway Company, having been sold on foreclosure became the property of the said Monon Railway Company and has for the last twenty-five years been used, operated and managed as a railroad for the transportation of freight and passengers in the State of Indiana and is still so used by the said Monon Railway Company, and by virtue of such sale and foreclosure and other legal proceedings, the exact character of which is unknown to your petitioner, the said Monon Company has succeeded to all the rights, privileges and franchises and become subject to all contracts relative to the operation of said

road and all liabilities of the said Chicago & Indianapolis Air Line Railway Company as its legal successor and that the said Monon Company for about twenty years has paid all the costs and
17 expenses of keeping up, maintaining and operating said crossing and providing a watchman therefore and giving proper signals and taking other precautions necessary for the safety of the public and the protection of the property of the said two railroad companies in crossing one another at said Maynard Crossing, and has otherwise recognized the said contract and treated the same as being valid and effective.

And your petitioner avers that the best and most approved interlocking system in use by railroad companies at grade crossings, consists of a tower erected in close proximity to the crossing, with large windows in the upper room, in which is stationed a watchman who has a clear view of the various tracks leading to the crossing and as a train having the right of way draws near, the watchman pulls certain ones of his series of levers in the room, which connect with wires, rods, and pipes running out along the railroad track, and thereby lower- semaphores, or as they are generally termed, targets, located on the line of the railroad at a distance from the crossings, thereby indicating to the engineer of the approaching train that it is safe for him to pass, and at the same time the watchman closes the switch in front of this train, giving it a clear track, the other switches on the other tracks remaining open with danger signals up, and all the switches being locked. The result is that if the engineer of any train on another track should disregard the danger signal, his train would run into an open switch and be derailed. In the night, lights, instead of targets, are used as signals.

The operation of an interlocker such as would be required at Maynard, would make it necessary to employ at least two watchmen and a superintendent one or the other of whom must always be on duty. The cost of such installation would be Five Thousand
18 Dollars, and the cost of maintenance and operation Sixteen Hundred Dollars per annum; that the present expense- of the said Maynard Crossing are as follows:

Two watchmen at $35.00 per month, $840.00 per year...	$840.00
Supplies and repairs at $5.00 per month.....	60.00
	$900.00

And your petitioner says that if the interlocking system should be adopted as ordered by said Commission it would still cost over Eight Hundred and Forty Dollars per year to pay said watchmen and the cost of supplies and repairs of the railroad track and frogs at the crossing would be Forty Dollars per year

And the said Grand Trunk Western Railway Company now objects to the order and regulation of the said Railroad Commission so made relative to the said crossing, and avers that the same is inequitable, unjust, and illegal and in violation of the rights of the said Grand Trunk Western Railway Company under said contract in this:

First. That it compels the Grand Trunk Western Railway Company to pay a part of the cost and expense of erecting said interlocking system and of placing such interlocking system in operation, including therein all the cost of good and sufficient semaphores and other signals.

Second. That the order of the Commission has made provides that before any division of operating expenses shall be made the said Monon Company shall pay to the petitioner herein the sum of $780.00, and the balance of operating expenses be apportioned, whereas, such amount is insufficient to pay the watchmen and cost of operating and maintaining signals.

Third. For the reason that the said amount of $780.00 is fixed arbitrarily and makes no provision for such increase in the manner or cost of keeping watchmen and increased cost of maintaining and operating signals.

19 Fourth. In that the order compels the Grand Trunk Western Railway Company to pay a part of the cost of maintaining and keeping in operation all signals of which the said interlocking system is a part.

Fifth. That by virtue of the contract aforesaid and the affirmation of the same by the respective parties entering into the same and by their successors, it has become and is the duty of the said Monon Company to pay all the cost and expense of keeping in repair, operating and managing the crossing aforesaid, and all signals and appliances and interlocking switch that it may be necessary or proper to erect at the Maynard Crossing aforesaid, in order that petitioner may operate its road with convenience and safety.

Sixth. That the effect of said order, should it be enforced, would be in violation of the Constitution of the United States.

Seventh. That the enforcement of the said order of the Railroad Commission would deprive the Grand Trunk Western Railway Company of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Indiana.

Wherefore the said Grand Trunk Western Railway Company prays that said order be annulled and set aside or so far modified as to compel the said Monon Company to pay all the cost and expense of installing, operating, and maintaining the said crossing, and the said proposed interlocking system at that point; and as the said Monon Company is interested in the result of this litigation, the said Grand Trunk Western Railway Company prays that the said Monon Company be made a party defendant to this suit and required to appear set up and defend any rights or privileges

20 that it may have or claim to have in or about the installation of the said interlocking system.

ANDERSON, DU SHANE AND CRABILL,
Attorneys for Grand Trunk Western Ry. Co.

21 And afterwards, to-wit: On October 2nd, 1905, the same being the Twenty-fifth judicial day of the September Term, 1905, of said court the following further proceedings were by said court had and entered of record in said cause, to-wit:

No. 6952.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Demurrers Filed.

Now again come the parties hereto, by counsel, and each defendant files separate demurrer to the amended complaint herein, which demurrers are in the words and figures following, to-wit:

Demurrer.

STATE OF INDIANA,
Lake County, ss:

Lake Circuit Court, September Term, 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
RAILROAD COMMISSION OF INDIANA.

Demurrer of Indiana R. R. Commission.

The defendant, the Railroad Commission of Indiana, demurs to the plaintiff's amended complaint in the above entitled cause and says:

First. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

C. V. McADAMS,
Attorney for Defendant.

22 Demurrer.

STATE OF INDIANA,
Lake County, ss:

Lake Circuit Court, September Term, 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Demurrer of Union B. Hunt.

The defendant, Union B. Hunt, demurs to the plaintiff's amended complaint in the above entitled cause and says:

First. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

C. V. McADAMS,
Attorney for Defendant.

Demurrer.

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court, September Term, 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
CHARLES V. MCADAMS.

Demurrer of Chas. V. McAdams.

The defendant, Charles V. McAdams, demurs to the plaintiff's amended complaint in the above entitled cause and says:

First. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

CHARLES V. McADAMS, *Defendant.*

23 Demurrer.

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court, September Term, 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
WILLIAM J. WOOD.

Demurrer of Wm. J. Wood.

The defendant, William J. Wood, demurs to the plaintiff's amended complaint in the above entitled cause and says:

First. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

C. V. McADAMS,
Attorney for Defendant.

And the defendant, the Railroad Commission of Indiana, files its separate motion to dismiss the action herein, which motion is in the words and figures following, to-wit:

24 *Motion to Dismiss.*

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court, September Term, A. D. 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILROAD COMPANY et al.

Motion to Dismiss by C., I. & L. R. R. Co.

The Chicago, Indianapolis and Louisville Railroad Company

moves the court to dismiss the above entitled cause upon each of the following grounds, separately:

First. For the reason and upon the ground that the circuit court has no jurisdiction of the subject-matter of this action.

Second. For the reason and upon the ground that this action is in the nature of an appeal from an award made by the Railroad Commission of the State of Indiana, and there is no law authorizing any appeal from such award or finding of said commission.

FIELD, KURRIE AND PETERSON,
Attorneys for the Chicago, Indianapolis & Louisville Railroad Company.

And afterwards, to-wit: On December 11th, 1905, the same being the Nineteenth judicial day of the November Term, 1905, of said court, the following further proceedings were by said court had and entered of record in said cause, to-wit:

25 No. 6952. Appeal.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT, C. V. MCADAMS, and WILLIAM J. WOOD, THE Railroad Commission of Indiana, and The Chicago, Indianapolis & Louisville Railway Company.

Ruling of Court on Motion to Dismiss & Demurrer Filed by C., I. & L. R. R. Co.

Now again come the parties and the court being fully advised does overrule the motion of the Chicago, Indianapolis & Louisville Railway Company to dismiss this cause, and thereupon the said Chicago, Indianapolis & Louisville Railway Company files its demurrer to the petition of the Grand Trunk Western Railway herein filed, which Demurrer is in the words and figures following, to-wit:

Demurrer.

STATE OF INDIANA,
Lake County, ss:

In the Lake Circuit Court, September Term, A. D. 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILROAD COMPANY et al.

Demurrer of C., I. & L. R. R. Co.

The defendant, The Chicago, Indianapolis & Louisville Railway Company, on its own behalf separately and severally demurs to the plaintiff's amended petition herein upon each of the following grounds separately.

First. For the reason and upon the ground that the court has no jurisdiction of the subject-matter of this action.

Second. For the reason and upon the ground that the amended petition does not state facts sufficient to constitute a cause of action against said defendant.

FIELD, KURRIE AND PETERSON,
Attorneys for the Chicago, Indianapolis & Louisville Railway Company.

26 *Demurrer of Each Defendant Sustained.*

And the court being fully advised herein does sustain the demurrer of the Railroad Commission of Indiana, herein, to which ruling the said Grand Trunk Western Railway doth now except; and the court also sustains the demurrer of the Chicago, Indianapolis & Louisville Railway Company filed herein, to which ruling of the court the said Grand Trunk Western Railway Company does now except, and the court also sustains each of the demurrers herein filed by Union B. Hunt, C. B. McAdams and William J. Wood, and the said Grand Trunk Western Railway Company does now except to the action of the court in overruling each of said several*ly* demurrers, separately.

And now the said petitioner abiding by its complaint and failing to plead further, it is found by the court that the plaintiff shall take nothing by its petition herein filed and should pay the costs of this action.

Judgment. Appeal Prayed. Appeal Granted.

It is therefore ordered that the said Grand Trunk Western Railway shall take nothing in this action, and defendants shall recover of said plaintiff, Grand Trunk Western Railway Company, all their costs herein laid out and expended; and thereupon the said Grand Trunk Western Railway Company prays an appeal to the Supreme Court of the State of Indiana on its filing its appeal bond in the sum of Two Hundred ($200.00) Dollars to be signed by said Grand Trunk Western Railway Company and Andrew Anderson as surety, the said bond to be filed within thirty days from this date.

Appeal Bond Filed.

And afterwards, to-wit: On December 29th, 1905, the plaintiff, by its attorneys, filed in the office of the Clerk of the Lake Circuit Court its certain appeal bond herein, which bond is in the words and figures following, to-wit:

27 *Appeal Bond.*

STATE OF INDIANA,
Lake Circuit Court:

—— Term, 1905.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Appeal Bond.

Know all men by these presents that we, Grand Trunk Western Railway Company and Andrew Anderson are held and firmly bound unto the defendant-, Union B. Hunt and others, in the penal sum of Two Hundred Dollars, for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 29th day of December, 1905.

The condition of the above obligation is such that

Whereas, heretofore, to-wit: On the 11th day of December, 1905, the said defendants, in the Lake Circuit Court, recovered a judgment against the said Grand Trunk Western Railway Company sustaining demurrer and for the costs of suit, taxed at $——, from which said judgment of said Lake Circuit Court the said plaintiff has taken an appeal to the Supreme Court of Indiana.

Now, if the said Grand Trunk Western Railway Company shall and will duly prosecute said appeal and abide by and pay the judgment and costs which may be rendered against it, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

GRAND TRUNK WESTERN RAILWAY COMPANY,
By J. J. ROONEY, *Attorney in Fact.*
ANDREW ANDERSON. [SEAL.]

28 In the Lake Circuit Court, Crown Point, Indiana.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Be it remembered, that now in vacation on this 11th day of January, 1906, the appellant and plaintiff, the Grand Trunk Western Railway Company, files its præcipe herein, which præcipe is in the words and figures following, to-wit:

Præcipe.

STATE OF INDIANA,
Lake Circuit Court:

Petition. No. 6952.

GRAND TRUNK WESTERN RAILWAY COMPANY
v.
UNION B. HUNT et al.

Præcipe.

To the Clerk of the above named Court:

Whereas, The plaintiff in the above entitled cause has appealed the same, you will please make out and duly certify a transcript of said cause, setting out in said transcript the amended petition and complaint therein filed and the motion, the record showing the filing of the original complaint and amended complaint, all demurrers filed in said cause and motions to dismiss, and the rulings of the court on said demurrers and motions and the rulings and judgment of the court, and the filing of the appeal bond and this præcipe.

ANDERSON, DU SHANE AND CRABILL,
Attorneys for Plaintiff.

29 *Certificate.*

UNITED STATES OF AMERICA.

STATE OF INDIANA,
County of Lake, ss:

I, Harold H. Wheeler, Clerk of the Circuit Court of Lake County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify, That the above and foregoing transcript contains full, true and correct copies of all papers and entries in said cause required by the above and foregoing præcipe.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Crown Point, in the said County, this 11th day of January, A. D. 1906.

[SEAL.] (Signed) HAROLD H. WHEELER,
Clerk of the Circuit Court.

Costs of transcript $5.00.
Paid by plaintiff.

HAROLD H. WHEELER, *Clerk.*

30 STATE OF INDIANA:

In the Supreme Court.

No. —.

THE GRAND TRUNK WESTERN RAILWAY COMPANY, Appellant,
vs.
UNION B. HUNT, C. V. MCADAMS, WILLIAM J. WOOD, THE RAILroad Commission of the State of Indiana, and The Chicago, Indianapolis and Louisville Railway Company, Appellees.

Appeal from Lake Circuit Court.

Assignment of Errors.

(Filed Jan. 27, 1906. R. A. Brown, Clerk.)

Assignment of Errors.

The above named appellant says that there is manifest error in the judgment and proceedings in this cause in this, namely:

1*st*. That the Court erred in sustaining the demurrer of Union B. Hunt to the amended complaint in this cause.

2*nd*. That the Court erred in sustaining the demurrer of C. V. McAdams to the amended complaint filed in this cause.

3*rd*. That the Court erred in sustaining the demurrer of William J. Wood to the amended complaint.

4*th*. That the Court erred in sustaining the demurrer of the Railroad Commission of the State of Indiana to the amended complaint in this cause.

5*th*. That the Court erred in sustaining the demurrer of the Chicago, Indianapolis and Louisville Railway Company to the amended complaint in this cause.

For which errors Appellant prays that the judgment be reversed.

(Signed) ANDERSON, DU SHANE & CRABILL,
Attorneys for Appellant.

31 And that afterwards, to-wit: On the 26th day of February, 1906, the same being the 79th Judicial Day of the November Term, 1905, of said Court, the following further proceedings were had in said cause, to-wit:

Comes now the appellant, by its said attorneys, and this cause is submitted to the Court for judgment and decree, as provided by an Act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Court in relation thereto.

And that afterwards, to-wit: On the 16th day of April, 1906, the same being the 121st Judicial Day of the November Term, 1905, of said Court, the following further proceedings were had in said cause, to-wit:

Comes now the appellant, by its said attorneys, and files its brief herein, which said brief is in the words and figures following, to-wit:

(Here Insert.)

And that afterwards, to-wit: On the 1st day of May, 1906, the same being the 134th Judicial Day of the November Term, 1905, o fsaid Court, the following further proveedings were had in said cause, to-wit:

Comes now the appellee, Chicago, Indianapolis & Louisville Railway Company, by its attorneys, E. C. Field, J. B. Peterson, H. R. Kurrie, and C. V. McAdams, and files its brief in said cause, which said brief is in the words and figures following, to-wit:

(Here Insert.)

32 And that afterwards, to-wit: On the 17th day of May, 1906, the same being the 148th Judicial Day of the November Term, 1905, of said Court, the following further proceedings were had in said cause, to-wit:

Comes now the appellee, the Railroad Commission of Indiana, by its attorneys, E. C. Field, J. B. Peterson, H. R. Kurrie, and C. V. McAdams, and files its brief herein, which said brief is in the words and figures following, to-wit:

(Here Insert.)

And that afterwards, to-wit: On the 19th day of May, 1906, the same being the 150th Judicial Day of the November Term, 1905, of said Court, the following further proceedings were had in said cause, to-wit:

Comes now the parties by counsel, and the appellee, Railroad Commission of Indiana, files its petition to advance this cause, which said petition is in the words and figures following, to-wit:

(Here Insert.)

And that afterwards, to-wit: On the 29th day of May, 1906, the same being the 2nd Judicial Day of the May Term, 1906, of said Court, the following further proceedings were had in said cause, to-wit:

Come now the parties by counsel, and the Court being fully advised in the premises, grants the petition to advance said cause, heretofore filed by the appellee, Railroad Commission of Indiana, and said cause is advanced.

33 And that afterwards, to-wit: On the 23rd day of October, 1906, the same being the 128th Judicial Day of the May Term, 1906, the following further proceedings were had in said cause, to-wit:

Come now the parties by counsel, and the Court being fully advised in the premises, transfers this cause to the Appellate Court of Indiana, with an opinion by Monks, J., which opinion is in the words and figures following, to-wit:

No. 20769.

GRAND TRUNK WESTERN RAILWAY CO.

vs.

UNION B. HUNT et al.

From the Lake Circuit Court.

MONKS, *J.*:

The Chicago, Indianapolis & Louisville Railway Company, known as the "Monon," filed with the Railroad Commission of this State, a petition against appellant and another railroad company under the act of 1897, Acts 1897, pp. 237-239, being Secs. 5158*a*-5158*h* Burns 1901, to compel the construction, operation, and maintenance of an interlocking device at points in Lake County, Indiana, where said railroads cross the track of the "Monon." The Railroad Commission granted the prayer of said petition and apportioned the cost of installing, maintaining, and operating said interlocking switch among the parties.

This suit was brought by appellant in the court below to review and revise said action of the Railroad Commission, and purports to be brought under the provisions of Sec. 6 of the Railroad Commission Act, Acts 1905, pp. 89, 90, being Sec. 5405*f* Burns Supp. 1905. Final judgment on demurrer to the amended complaint was rendered against appellant.

Said Sec. 6 (5405) expressly provides that appeals from judgments of the circuit or superior courts, rendered in proceed-
34 ings under said Sec. 6, shall be to the Appellate Court. In ordering this transfer, we do not decide that an action can or can not be brought under said Sec. 6 to review and revise the action of the Railroad Commission in proceedings under the Interlocking Switch Act, Acts 1897, p. 237-239, being sections 5158*a*-5158*h* Burns 1901, as that is a question for the determination of the Appellate Court. This appeal is therefore transferred to the Appellate Court.

And that afterwards, to-wit: On the 28th day of May, 1907, the same being the 2nd Judicial Day of the May Term, 1907, the following further proceedings were had in said cause, to-wit:

Come now the parties by counsel, and the Court being fully advised in the premises, affirms the judgment of the Court below, with the following opinion, pronounced by Rabb, J., to-wit:

In the Appellate Court of Indiana, Second Division.

No. 6317.

GRAND TRUNK WESTERN RAILWAY CO.
v.
UNION B. HUNT et al.

Appeal from the Lake C. C.

RABB, *J.*:

Prior to and during the year 1880, a railroad company known as the Chicago and Grand Trunk Railway Company, owned and operated a line of railroad now owned and operated by the appellant, the Grand Trunk Western Railway Company. Its line of road ran east and west through the station called Maynard, in Lake County, in this State. In the year 1880, a railroad company known as the Chicago and Indianapolis Air Line Railway Company,
35 constructed the line of road now owned and operated by the Appellee, the Chicago, Indianapolis and Louisville Railway Company, known as the "Monon," which line of road crossed the line of the Grand Trunk Western Railway at the station of Maynard.

The appellant is the successor in rights and interests of the Chicago and Grand Trunk Railway Company, and the appellee, the Chicago, Indianapolis and Louisville Railway Company is the successor in rights and interests of the Chicago and Indianapolis Air Line Railway Company.

At the time the last-mentioned line of railway was constructed the two companies then interested, the Chicago and Grand Trunk Railway Company and the Chicago and Indianapolis Air Line Railway Company, entered into a written contract, as follows: "This agreement made and entered into near July 16th, 188–, by and between the Chicago & Grand Trunk Railway, party of the first part, and the Chicago & Indianapolis Air Line Railway, party of the second part, Witnesseth: That the party of the first part, for and in consideration of the performance by the party of the second part of the stipulations and agreements hereinafter set forth, doth give and grant to the said party of the second part the right to construct and operate the said Chicago & Indianapolis Air Line Railway over and across the right of way of the said Chicago & Grand Trunk Railway at the point where the said Chicago & Indianapolis Air Line Railway, as now located and in process of construction, shall cross the same at or near Maynard Station on the line of the said Chicago & Grand Trunk Railway, which said railway of the party of the second part shall have constructed, kept and maintained at a grade on a level with the railway of said party of the first part at the point of crossing as above specified herein.

36 "And the said party of the second part, in consideration of the right to construct and operate the said Chicago &

Indianapolis Air Line Railway across the right of way of said party of the first part, as above granted and set forth, agrees to construct, put in and maintain good and sufficient frogs and crossings at the points where the track of the said Chicago & Indianapolis Air Line Railway crosses the track of the Chicago & Grand Trunk Railway, as aforesaid, and should the party of the first part, at any time hereafter, construct and lay down additional track or tracks, at the said point of intersection, the party of the second part agrees in like manner to construct, put in, and maintain sufficient frogs and crossings to enable the party of the first part to cross the track or tracks of said second party's railway.

"All of which crossings shall be put in at and upon the grade of the railway of the party of the first part, and shall be done in a good and substantial manner, so that the party of the first part shall be able to operate its road at that point with convenience and safety, and that said crossings shall be so maintained and kept in repair by the party of the second part at its individual expense forever.

"And the party of the second part further agrees that it will at said point of intersection, erect, put up and forever maintain good and substantial semaphores, or other signals, and provide the requisite watchmen to take charge of and operate the same, all of which shall be at the individual expense of said party of the second part.

"In witness whereof the parties have hereunto set their hands the day and year first above written," etc.

Under this agreement the Chicago & Indianapolis Air Line Railway Company and its successor, the Monon Company have ever since
the said crossing was completed, maintained a semaphore,
37 signal and watchmen at said crossing at their own expense.

On the 4th of May, 1905, the appellee, the Monon Company, filed with the Railroad Commission of this State a written petition praying that an interlocking system should be established at this crossing, and also at its crossing with another road in the close vicinity. Due notice was given to all the parties. The Railroad Commission met pursuant to statute, examined the crossing, and afterwards, all the railroad companies interested appearing, the Commission ordered that interlocking switches should be installed and put in use at this crossing, and that the cost of installing the interlocking plant should be apportioned between the appellant Company and the appellee, the Monon Company, upon the basis of functions of levers used in the operation of the plant for the benefit of the several roads respectively. It further ordered that the expense of operation of the device should be sustained by the two companies interested and affected, upon the same basis, except that the petitioner should contribute the sum of $780.00 per annum to the expense fund, and the expense in excess of this sum should be apportioned between the two companies as above stated.

Afterwards the appellant herein filed its petition in the Lake Circuit Court, setting forth a description of the interlocking system ordered installed by the Railroad Commission, and the manner of operating the same, and averring that the cost of installing such

plant would be $5,000.00, and the cost of maintenance and operation would be $1,600.00 per annum, and that the present expense of said crossing was $900.00; and averring that the appellant objects to the order and regulation of the Railroad Commission made relative to said crossing, on the ground that it compels the Grand Trunk
38 Western Railway Company to pay part of the cost and expense of erecting said interlocking system, including semaphores and other signals, and for the reason that it makes no provision for the payment by the Monon Company of any increased cost of maintaining and operating the signals: that by virtue of the contract above specified, it became the duty of the Monon Company to pay all the cost and expenses of keeping in repair, and operating, and managing the crossing aforesaid; and that the order is in dereliction of the rights of the appellant under the contract, and asks an order to annul and set aside the order, or to modify the same, so far as to compel the Monon Company to pay all the cost and expense of installing, operating and maintaining the interlocking switch at the crossing.

The proceeding instituted by the Monon Company to have an interlocking switching device maintained at this crossing is pursuant to the statute upon that subject, which originally lodged the power to order the installation of such interlocking switching device in the hands of the Auditor of State, from whose hands it was transferred by the Railroad Commission Act to the hands of the Railroad Commission.

The first question that confronts the court in the consideration of this case is the question of jurisdiction. It is contended by the appellee, the Monon road, that the action of the Railroad Commission on this subject is final and conclusive on the parties, and not subject to review in court. The argument is made that the law providing for the installation of interlocking switching devices at railroad crossings is an exercise of the police power of the State; that it is a legislative act delegated to the Railroad Commission, and upon which the parties named have no right to a judicial
39 hearing, unless such right is expressly conferred by law, and that no such hearing is provided for in the statute. Were appellee's premises well grounded, its argument would appeal to the court with a great deal of cogency, but is the premise sound?

Section three of the Act of 1897, approved March 8, 1897, provides for the protection of railroad crossings by interlocking switches, and vests the authority to hear and determine all matters connected with the establishment of such protection in the Auditor of State.

Section three of the Railroad Commission Act, confers authority on the Commission to adopt all necessary regulations to govern car service, and the transferring and switching of cars from one railroad to another at junction points, to require and supervise the location and construction of sidings and connections between railroads, to supervise the crossing of tracks and side-tracks of railroads by other railroads now in process of construction or extension, or which may hereafter be constructed or extended, and vests in the Commission the authority theretofore vested in the Auditor of State under the

laws of the State with reference to the crossing of railroads by other railroads or by railroads operated by electricity, and the installation and maintenance of interlocking appliances at such crossings, and to supervise and regulate private car line service.

Section six of the Railroad Commission Act provides, among other things, that "if any such railroad company or other corporation or party in interest, shall be dissatisfied with any order or regulation of said Commission, respecting the location or construction of sidings, switches, or connections between railroads, or the crossing of one railroad by another, * * * such dissatisfied company or party may, within thirty days after any such order or regu-
40 lation has been made, file a written petition to the circuit or superior court of the county wherein any such siding, switch, connection, crossing, junction point or private track is situated, setting forth therein the particular cause or causes of objection to the order or regulation of the Commission, complained of, * * *, such petition, upon proof of the service of said notice, or upon the appearance of the Commission to such petition, shall be set down for hearing without delay, and shall be heard and determined as a suit in equity, without delay; and the court shall have power to affirm the action of said Commission, or to change, modify, or set aside the same, as justice may require."

An opportunity is thus given to those whose rights are affected by the order of the Railroad Commission in these respects to have the question of their rights heard and determined in a judicial tribunal. This statute should receive a liberal construction in favor of the right of the citizen to thus have his cause heard and determined in court, and we are constrained to hold that the term "any order or regulation respecting crossings" is broad enough to include orders made by the Railroad Commission installing interlocking plants for the purpose of protecting such crossings.

Recognizing appellant's right to a judicial hearing of its cause, the burden rests upon it to affirmatively show by the averment of facts set forth in its petition, that the order of the Railroad Commission with reference to the installation of the interlocking switch at the crossing of the two roads mentioned and described in the petition, does it an injustice, or is in some manner unwarranted by law.

The case does not come before this court on appeal. It is here as an attack upon the fairness or validity of the order of the
41 Railroad Commission, the presumption being that the order is valid, fair and just to all the parties. The ground of appellant's complaint against the order of the Railroad Commission in installing the interlocking switch at the crossing is that the order, insofar as it apportions the cost and expense of installing the device and maintaining and operating the same, invades the contractual rights of the appellant as against the appellee, the Monon road; that the contract entered into between their predecessors in right, the Chicago and Grand Trunk Western Railway and the Chicago and Indianapolis Air Line Railway, places the entire burden of protecting the crossing upon the appellee, the Monon road, and that the order of the Railroad Commission, requiring appellant to pay any

part of this expense, is in violation of the appellant's constitutional right under its contract. This contention is met by the appellee, the Monon road:

(1) By the proposition that the installation of the interlocking switch by the Railroad Commission is the exercise by it of the police power of the State, delegated to the Commission by the legislature; that the Railroad Commission, in the exercise of this power, is bound by no private contract between the parties; that the constitutional provisions of the State and Federal government, protecting the contractual rights of parties, does not apply to prevent the exercise of the police power of the State; that such contracts cannot be set up against the exercise of such power by the legislature or the authorities to whom the legislature have delegated the power; and that the Railroad Commission, therefore, in the exercise of this power, is in no way bound to recognize the contract between the two railroad companies respecting the expenses of protecting the crossing.

(2) That the contract itself will bear no such construction as is contended for by appellant; that the terms of the contract
42 preclude the idea that it was in the minds of the contracting parties that such an expense as is involved in the erection, maintenance, and operation of the interlocking switch was intended to be imposed upon or assumed by the Monon road or its predecessor.

First, of appellee's contention that the Railroad Commission was not bound to recognize appellee's rights under the contract set up in the petition between the predecessor of the Monon and the predecessor of the Grand Trunk, at the time the crossing of the two roads was made. It is undoubtedly the law that private contracts between corporations or natural persons can in no way preclude the legislature from enacting and enforcing laws for the protection of the lives, persons and morals of the citizens of the State. The right to enact such laws is the right of self-defense that inheres in the State as it does in the individual, and there is no question but that the law regulating the location, erection and maintenance of interlocking switches at railroad crossings belongs to this class of legislation. But when this is conceded it does not necessarily follow that the contractual rights of the appellant are obliterated. The law itself in nowise interferes with them. It is in the execution of the law, not in its letter or its spirit, that it is contended the appellant's contractual rights are invaded. The law regulating this subject places its enforcement in the hands of the Railroad Commission, and it is true, vests the Commission with power and authority to apportion the expenses of the work between the roads interested; but it lays down no rule for their guidance that in anywise trenches on the contractual rights of either road as against each other. It leaves the Commission to be guided in the work of apportioning the expense by the general rules of law and justice. It leaves it per-
43 fectly free to carry out and enforce the duties and obligations of the roads as between themselves, precisely as a court of justice might enforce these duties and obligations, and we hold that in the performance of this duty the Railroad Commission is bound

by the same rules of law that would govern a court in deciding the same question. The question presented for the Commission to determine, as it would be to a court, is what is just and right between the two companies who must bear this expense, and if there is a contract existing between the companies, by the terms of which one of them is in duty bound to bear all the expenses, the Railroad Commission may not properly ignore such contract, and to do so would be good ground for petition to the circuit court for redress.

The fact that it is a police power of the State which the Commission executes, can make make no difference. Where the execution of this power is entirely consistent with the protection of the rights of the citizen under his contract, it must be protected. If it is not so consistent, then the contract must give way to public necessity. But in this case there can be no pretense that the exercise of the police power invoked would be in the least interfered with by the full recognition of all appellant's rights under the contract set up in the petition. It could make no possible difference to the public safety whether all of the expenses of the installation, maintenance and operation of the interlocking switching plant to be installed were borne entirely by one of the railroad companies interested, or whether the expense was to be divided between the two. So we hold that whatever rights the appellant had in the contract set up, it was the duty of the Railroad Commission to recognize them, and if they have been violated in the order the appellant has a right to redress in the court.

44 Does the contract set forth in appellant's petition impose upon the appellee, the Monon road, the burden of paying the expense of installing, maintaining and operating the interlocking switch in question?

The stipulations of the contract bearing upon the question are as follows: "And the said party of the second part, in consideration of the right to construct and operate the said Chicago & Indianapolis Air Line Railway across the right of way of said party of the first part, as above granted and set forth, agrees to construct, put in and maintain good and sufficient frogs and crossings at the point where the track of the Chicago & Indianapolis Air Line Railway crosses the track of the Chicago and Grand Trunk Railway, as aforesaid, and should the party of the first part, at any time hereafter, construct and lay down additional track or tracks, at the said point of intersection, the party of the second part agrees in like manner to construct, put in, and maintain sufficient frogs and crossings to enable the party of the first part to cross the track or tracks of said second party's railroad. All of which crossings shall be put in at and upon the grade of the railway of the party of the first part, and shall be done in a good and substantial manner, so that the party of the first part shall be able to operate its road at that point with convenience and safety, and that said crossings shall be so maintained and kept in repair by the party of the second part at its individual expense forever."

The first and second clauses of this contract clearly relate simply to the laying of the crossing, not to its protection by signals, or

guards, or in any manner, and the order of the Railroad Commission in no way could affect the rights of the parties under this claim of their contract.

The establishment of the interlocker was to guard the
45 crossing, not to in any way affect its repair or its maintenance. The expression in the second clause, "shall be done in a good and substantial manner, so that the party of the first part shall be able to operate its road at that point with convenience and safety," relates to the manner in which the crossing shall be put in, and not to the manner of its being guarded. The only part of the contract that has reference to the guarding of the crossing is that section providing for the erection, at the point of intersection, and the maintenance of good and substantial semaphore signals. It would be interpolating into this contract terms which were clearly not in the minds of the parties at the time it was made, to hold that it would include interlocking switches and signals erected at far distant points from the intersection, as are contemplated by the interlocking system, and clearly do not apply to the character of work that is proposed by the interlocking device. The order of the Railroad Commission in directing the installation of the interlocker at this point recognizes the rights of the appellant under its contract, and in the very carefully considered order prepared by the Commission, they have required the Monon road to pay first into the fund, to be used for the operation of this plant, the sum of $780.00, before there shall be an apportionment of costs, and it is not made manifest by the petition that this is not a fair and just apportionment of the expenses connected with the installation and maintenance and operation of this plant, having in view the rights of the appellant under its contract. If the contract could be construed so as to require the payment of all the expenses of the plant by the appellee, the Monon road, then the order of the Railroad Commission would clearly be an invasion of the rights of the appellant; but the contract relied upon admits of no such construction.

The judgment of the court below is affirmed.

46 It is therefore considered by the Court that the judgment of the Court below in the above entitled cause, be in all things affirmed at the cost of the Appellant, all of which is ordered to be certified to said Court.

And it is further considered by the Court, that the Appellees recover of the Appellant the sum of —— for their costs and charges in this behalf expended.

THE STATE OF INDIANA,
Appellate Court:

I, Ed. V. Fitzpatrick, Clerk of the Supreme Court, and ex-officio Clerk of the Appellate Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said Appellate Court in the above entitled cause.

In witness whereof, I hereto set my hand and affix the seal of

said Appellate Court, at the City of Indianapolis, this — day of ——, 190–.

—— ——, *C. A. C.*

[Endorsed:] In the Appellate Court. —— Term, 190–. —— —— vs. —— ——. Certified copy of opinion. Ed. V. Fitzpatrick, Clerk Appellate Court.

47 And afterwards, to-wit on the 14th day of December, 1908, being the 19th Judicial Day of the November Term, 1908, of said Appellate Court, the following further pleas and proceedings were had herein:

Comes now the Appellant by counsel, and files in the office of the Clerk of the Appellate Court, his petition in the Supreme Court of the United States, by *Noble C. Butler, associate Justice of said United States Supreme Court*, for the allowance of a writ of error, said petition and the allowance thereof being hereto next below attached, and being as follows:

48 In the Appellate Court of the State of Indiana.

No. 6317.

GRAND TRUNK WESTERN RAILWAY COMPANY

vs.

THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. MCCLURE, and The Chicago, Indianapolis & Louisville Railway Company.

Petition for Writ of Error.

Comes now Grand Trunk Western Railway Company, the appellant in this cause, and shows: That on the 28th day of May, 1907, a final judgment was rendered and entered of record by this Court against this petitioner, Grand Trunk Western Railway Company, in this cause; that this petitioner was and is aggrieved in that in said judgment and in the proceedings had prior thereto in this cause certain errors were committed to its prejudice as follows:

That on and prior to May 4th, 1905, this petitioner owned and operated a line of railroad in and across Lake County, State of Indiana, and that on and prior to that day the appellee, said Chicago, Indianapolis & Louisville Railway Company, owned and operated a line of railroad in and across the same County and that said two lines of railroad crossed and cross each other at Maynard in said County; that on said day said Chicago, Indianapolis & Louisville Railway Company, then desiring to have said crossing operated by an interlocking device, and being unable to agree with this petitioner and with the Pittsburgh, Cincinnati, Chicago & Saint Louis

Railway Company, whose railroad also crossed and crosses
49 the railroad of said Chicago, Indianapolis & Louisville Railway Company in close proximity to the point of crossing of this petitioner's railroad and the railroad of said Chicago, Indianapolis & Louisville Railway Company, in respect to the kind and character of an interlocking device to protect said two crossings and in respect to the apportionment of the cost of installing, maintaining and operating the same, filed its petition with the appellee, the Railroad Commission of Indiana, which was then composed of three members, namely: The appellees in the present record, Union B. Hunt, C. B. McAdams, and William J. Wood; that said Railroad Commission of Indiana and the then persons just named composing the same received and entertained said petition and gave legal notice of a hearing thereon and on June 12th, 1905, made and entered of record an order thereon in substance and effect as follows:

That interlocking devices of some approved and modern manufacture be installed at the crossings of this petitioner's railroad with the railroads of said Chicago, Indianapolis & Louisville Railway Company, and said Pittsburgh, Cincinnati, Chicago & Saint Louis Railway Company in said Lake County, and that Y-connections and cross-over tracks of said several railroads be included within said interlocking devices, and further that the expenses of constructing and maintaining such devices be divided between the three companies upon the basis of functions of levers used in the operation of the plant, and that the expense of operating the device at the crossing of this petitioner's road with the road of said Chicago, Indianapolis & Louisville Railway Company be sustained by said two companies upon the basis provided in said order for the expense of construction and maintenance, except that before any division of the operating expenses be made, the Chicago, Cincinnati & Louis-
50 ville Railway Company should contribute and pay over Seven hundred and eighty Dollars ($780) per annum, and further that the expense of operating the device at the crossing of the Pittsburgh, Chicago, Cincinnati, and Saint Louis Railway Company's road and the road of said Chicago, Cincinnati and Louisville Railway Company be sustained by the latter upon the same basis as provided for the expense of construction and maintenance, except that before any division of the operating expenses be made, said two companies should each contribute and pay thereon the sum of Four hundred and fifty dollars per annum, and further that such interlocking device be installed within ninety days after said order should become effective under the rules of said Commission.

And this petitioner says that at the time said order was made and for many years prior thereto there was in existence and in force a contract between this petitioner and said Chicago, Indianapolis & Louisville Railway Company, which had been made and entered into by and between their predecessors in the ownership and operation of said two railroads, and which said contract provided in substance that the said predecessor of the Chicago, Cincinnati & Louisville Railway Company should construct and maintain at said point of crossing good and sufficient frogs and crossings at the grade of

the railroad of this petitioner in a good and substantial manner so that this petitioner should be able to operate its road at the point of crossing with convenience and safety, and that said crossing should be maintained and kept in repair by said predecessor of the said Chicago, Cincinnati & Louisville Railway Company at its individual expense forever, and that it would so construct and forever maintain good and substantial semaphores or other signals and provide the requisite watchmen to take charge of and operate the same,
51 all at its individual expense; that after this petitioner and said Chicago, Cincinnati & Louisville Railway Company became the owners of their respective railroads, they severally treated said contract as being in full force and effect between them, and that the said Chicago, Cincinnati & Louisville Railway Company performed all the terms and conditions of said contract, as had its predecessor, and at the time said order was made said contract was in full force and effect between it and this petitioner.

After said order was made, this petitioner appealed from the same to the Lake Circuit Court of Lake County, Indiana, and filed its amended petition in said court, making defendants thereto the then members of the Railroad Commission of Indiana and said Railroad Commission and the said Chicago, Indianapolis and Louisville Railway Company, and set up and averred in its said amended petition the said petition of the said Chicago, Indianapolis & Louisville Railway Company, the action of the said Railroad Commission and of the then members thereof in making said order relative to installing and maintaining said interlocking device, the existence of said contract between the predecessors of this petitioner and of the said Chicago, Cincinnati & Louisville Railway Company, and the facts showing that said contract was in existence and binding upon this petitioner and the said Chicago, Cincinnati and Louisville Railway Company at the times said petition was filed and said order made, and showing the great and additional cost and expense to this petitioner that would result to it from the installing and maintaining and operating said interlocking device over and above the expense of maintaining said crossing under said contract, and by the said amended petition alleged and averred among other things that

"*Fifth.* That by virtue of the contract aforesaid and the affirmation of the same by the respective parties entering into the same and by their successors, it has become and is the duty of the said
52 Monon Company to pay all the cost and expense of keeping in repair, operating and managing the crossing aforesaid, and all signals and appliances and interlocking switch that it may be necessary or proper to erect at the Maynard crossing aforesaid, in order that petitioner may operate its road with convenience and safety.

"*Sixth.* That the effect of said order, should it be enforced, would be to impair the obligations of the said contract and would be in violation of the Constitution of the United States.

"*Seventh.* That the enforcement of the said order of the Railroad Commission would deprive the Grand Trunk Western Railway

Company of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Indiana."

And this petitioner further shows that the said members of said Railroad Commission, the said Railroad Commission, and the said Chicago, Cincinnati & Louisville Railway Company appeared to its said amended petition and separately and severally filed demurrers thereto, which said demurrers were sustained by the Lake Circuit Court, and that it reserved separate and several exceptions to the said ruling of said Court and declined to plead further, whereupon judgment was rendered against it by the said Lake Circuit Court that it take nothing by its said amended petition and that the said defendants thereto recover of it their costs.

Thereupon this petitioner appealed to this, the Appellate Court of the State of Indiana, and assigned errors in said Appellate Court that the said Lake Circuit Court erred in sustaining the separate and several demurrers of the defendants to said amended petition, thereto. Upon the hearing this, the Appellate Court of the State of Indiana, decided that the Lake Circuit Court did not err in its said ruling upon the said demurrers to the said amended petition, and in all things affirmed the judgment of the Lake Circuit Court in said cause.

And this petitioner says and avers that the judgment of this Court is erroneous in this: That it necessarily held and decided
53 that the effect of said order of said Railroad Commission would not be to impair the obligations of said contract and would not be in violation of the Constitution of the United States, and further that the enforcement of said order would not deprive this petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

And this petitioner thereupon says that this Court decided adversely to it the federal questions so raised and presented for decision by it in its said amended petition, all of which will more fully appear in detail by the assignment of errors filed herein.

And the petitioner further shows that since the rendition of said judgment in said cause by this Court, the said Union B. Hunt and C. B. McAdams, appellees, have resigned as members of the said Railroad Commission of Indiana and have been succeeded by Henry M. Dowling and John F. McClure, who were duly appointed and qualified as members of said Railroad Commission, and do now hold and perform the duties pertaining to members of said Commission and are therefore substituted as parties hereto for said original appellees, Union B. Hunt and C. B. McAdams, who were made parties to said action as members of said commission and in no other capacity.

Wherefore the petitioner, the Grand Trunk Western Railway Company, prays that a writ of error may be issued to the Appellate Court of the State of Indiana for the correcting of the errors complained of and that a duly authenticated transcript of the record,

proceedings and papers herein may be sent to the United States Supreme Court.

SAMUEL PARKER,
ANDERSON, PARKER & CRABILL,
Attorneys for Grand Trunk Western Railway Company.

South Bend, Indiana.

54 [Endorsed:] Anderson, Parker & Crabill, Attorneys at Law, St. Jos. Co. Savings Bank Building South Bend, Ind. Filed Dec. 14, 1908. Edward V. Fitzpatrick, Clerk.

55 In the Appellate Court of the State of Indiana.

No. 6317.

GRAND TRUNK WESTERN RAILWAY COMPANY
vs.
THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE, and The Chicago, Indianapolis & Louisville Railway Company.

Order.

Comes now Grand Trunk Western Railway Company, the above named appellant, on this 14th day of December, A. D. 1908, and files and presents its petition praying for the allowance of a writ of error intended to be urged by it; and, praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States and that such other and further proceedings may be had in the premises as may be just and proper.

And, upon consideration of the said petition, this court desiring to give the petitioner an opportunity to test the question therein presented in the Supreme Court of the United States, it is ordered that a writ of error be allowed it, as prayed, provided, however, that said Grand Trunk Western Railway Company, appellant, execute and file its bond according to law in the sum of Seventy-five Hundred Dollars ($7500.) with American Surety Company of New York, as surety, payable to the original appellees herein and of such of them as were made parties to this action by virtue of their being members of the Railroad Commission of Indiana, appellee;

56 and, further that said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand and seal this 14th day of December, A. D. 1908.

WARD H. WATSON,
Chief Justice of the Appellate Court of the State of Indiana.

[Endorsed:] Filed Dec. 14, 1908. Edward V. Fitzpatrick, Clerk.

57 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellant, by counsel, and files a writ of error from the Supreme Court of the United States, to the said Appellate Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

58 UNITED STATES OF AMERICA:

The President of the United States of America to the Judges of the Appellate Court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Appellate Court, before you, between The Grand Trunk Western Railway Company and The Railroad Commission of Indiana, William J. Wood, Henry M. Dowling, John F. McClure and The Chicago, Indianapolis and Louisville Railway Company a manifest error hath happened to the great damage of the said The Grand Trunk Western Railway Company as by *his* complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 14" day of December, A. D. 1908.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk*.

[Endorsed:] Filed Dec. 14, 1908. Edward V. Fitzpatrick, Clerk.

59 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellant, by Counsel, and files a copy of its bond on appeal to the Supreme Court of the United States, in the penal sum of Seven Thousand Five Hundred Dollars ($7500), which bond is taken and approved, being hereto next below attached, and being as follows:

60 Appellate Court of the State of Indiana.

GRAND TRUNK WESTERN RAILWAY COMPANY, Appellant,
vs.
UNION B. HUNT, CHARLES B. MCADAMS and WILLIAM J. WOOD, The Railroad Commission of Indiana, and The Chicago, Indianapolis and Louisville Railway Company, Appellees.

Bond on Writ of Error.

Know all men by these presents that we, Grand Trunk Western Railway Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Union B. Hunt, Charles B. McAdams, and William J. Wood, and their successors in office, the Railroad Commission of Indiana, and the Chicago, Indianapolis and Louisville Railway Company in the full and just sum of Seven Thousand, Five Hundred Dollars ($7500) to be paid to them; to which payment, well and truly to be made, we bind ourselves and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of November in the year of our Lord One Thousand, nine hundred and eight.

Whereas at a term of the Appellate Court of the State of Indiana, in a suit pending in said Court between Grand Trunk Western Railway Company as appellant and Union B. Hunt, Charles B. McAdams, and William J. Wood, The Railroad Commission of Indiana, and The Chicago, Indianapolis & Louisville Railway Company, as appellees, a judgment was rendered against the said Grand Trunk Western Railway Company, and the said Company having obtained a writ of error and filed the same in the office of the Clerk of said Appellate Court to reverse the judgment in the aforesaid suit, and also a citation directed to the said appellees, now defendants in error, citing and admonishing them and each of them to be and appear at the Supreme Court of the United States at
61 Washington, D. C., within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the said Grand Trunk Western Railway Company shall prosecute said writ of error to effect and pay all costs and damages if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GRAND TRUNK WESTERN RAILWAY CO.,
By E. H. FITZHUGH, *Its Vice Pres't.*

Attest:
[SEAL.] A. B. ATWATER,
Director and Ass't to President.

AMERICAN SURETY CO. OF NEW YORK,
By E. F. CLARK, *Resident Vice President.*

Attest:
[SEAL.] JOHN S. HUNT,
Resident Ass't Secretary.

Approved, Dec. 14-1908.
WARD H. WATSON, *C. J.*

62 And on the same day, the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellant, by counsel, and files its citations on said writ of error, and proof of service of the citations on the defendants in error, said citations and proof of service thereof being hereto next below attached, and being as follows:

63 UNITED STATES OF AMERICA, *ss*:

The President of the United States to The Railroad Commission of Indiana, William J. Wood, Henry M. Dowling, John F. McClure, and The Chicago, Indianapolis & Louisville Railway Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States in the City of Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Appellate Court of the State of Indiana, wherein Grand Trunk Western Railway Company is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error, shall not be collected and why speedy justice shall not be done the parties in that behalf.

Witness the Chief Justice of the Appellat- Court of the State of Indiana this 14th day of December, 1908.

WARD H. WATSON,
Chief Justice of the Appellate Court of the State of Indiana.

Attest:

[Seal Appellate Court, State of Indiana.]

[SEAL.] EDWARD V. FITZPATRICK,
Clerk of the Appellate Court of the State of Indiana.

STATE OF ILLINOIS,
County of Cook:

We, the undersigned, defendants in error in the above entitled cause hereby acknowledge due service of the above citation.

WILLIAM J. WOOD.
HENRY M. DOWLING.
JOHN F. McCLURE.

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Railroad Commission of Indiana, William J. Wood, Henry M. Dowling, John F. McClure, and The Chicago, Indianapolis & Louisville Railway Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States in the City of Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Appellate Court of the State of Indiana, wherein Grand Trunk Western Railway Company is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error, shall not be collected and why speedy justice shall not be done the parties in that behalf.

Witness the Chief Justice of the Appellat- Court of the State of Indiana this 14 day of December, 1908.

WARD H. WATSON,
Chief Justice of the Appellate Court of the State of Indiana.

Attest:

[Seal Appellate Court, State of Indiana.]

[SEAL.] EDWARD V. FITZPATRICK,
Clerk of the Appellate Court of the State of Indiana.

STATE OF ILLINOIS,
County of Cook:

We, the undersigned, attorneys of record for the defendants in error in the above entitled cause hereby acknowledge due service of the above citation and enter an appearance for said defendants in error in the Supreme Court of the United States.

E. C. FIELD &
H. R. KURRIE,
Attorneys for Defendants in Error C., I. & L. Ry. Co.

65 And on the same day, the following further pleas and proceedings were had in said Court, in said cause:

Comes now the Appellant, by counsel, and files an Assignment of Errors in the Supreme Court of the United States, on the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

66 In the Supreme Court of the United States.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, Henry M. Dowling, John F. McClure, and The Chicago, Indianapolis & Louisville Railway Company, Defendants in Error.

Assignment of Errors on Writ of Error to the Appellate Court of the State of Indiana.

Comes now the plaintiff in error in the above entitled cause and avers and shows that, in the record and proceedings in said cause, the Appellate Court of the State of Indiana erred to the grievous injury and wrong of the plaintiff in error herein and to its prejudice and against its rights in the following particulars, to-wit:

1. The said Appellate Court of the State of Indiana erred in affirming the judgment of the Lake Circuit Court of Lake County, Indiana, whereby said Appellate Court held and decided that, acting under and in accordance with the provisions of an act of the General Assembly of the State of Indiana entitled "An Act providing for the creation of a railroad commission" etc., approved February 28, 1905, it was competent and lawful for the defendant in error, the Railroad Commission of Indiana, to make and enter of record the order requiring the plaintiff in error to contribute a material part of the expense and cost of installing, maintaining and operating the interlocking device and apparatus at the crossing of the railroad of the defendant in error, Chicago, Cincinnati &
67 Louisville Railway Company, with the railroad of the plaintiff in error, contrary to the terms and provisions of the contract existing between the former and the latter, under which terms and provisions the former was bound to provide the proper and necessary appliances and to operate the same to adequately protect and guard said crossing, all at its own cost and expense.

2. That said Appellate Court of Indiana erred in holding and deciding that the order of the Railroad Commission of Indiana whereby the cost and expense of installing, maintaining and operating an interlocking device and apparatus at the crossing of the railroads of the plaintiff in error and the Chicago, Cincinnati, & Louisville Railway Company, defendant in error, was apportioned between said companies and a material part thereof required to be paid by the plaintiff in error, was a lawful and proper exercise of the power of said Commission, notwithstanding the fact, which the plaintiff in error avers to be a fact, that at the time and for long before the said order was made and entered there was in existence and in full force a contract between said companies, under which said defendant in error was bound to protect and guard said crossing at its own expense.

3. That the said Appellate Court of the State of Indiana erred in holding and deciding that the contract set forth in the amended

petition filed in the Lake Circuit Court of Lake County, Indiana, did not require that the defendant in error, The Chicago, Cincinnati & Louisville Railway Company, should bear the entire expense and cost of installing, maintaining and operating such devices and appliances as would render the use of the crossing of its railroad and that of plaintiff in error, safe and secure and
68 that the said contract did not require said defendant in error to bear the entire cost and expense of installing, maintaining and operating the interlocking device petitioned for by it and ordered by said Railroad Commission, defendant in error.

4. That the Act of the General Assembly of the State of Indiana entitled "An Act providing for the creation of a Railroad Commission," etc. approved February 25, 1905, in so far as it abrogates and impairs the obligations of the contract existing between the plaintiff in error and the defendant in error, the Chicago, Cincinnati & Louisville Railway Company, under which it was and is the duty of the latter to supply, maintain and operate necessary and proper safety devices, signals and appliances at the crossing of the railroads of said two companies at Maynard, Lake County, Indiana, which said contract was in force at the time of and for long before said Act was passed, is void as being repugnant to Section 10 of Article 1 of the Constitution of the United States; and, the said Appellate Court of the State of Indiana erred in holding said order of the Railroad Commission of Indiana, whereby it was provided that the plaintiff in error should pay a material part of the expense of installing, maintaining and operating the crossing safety device provided for in said order, to be a valid exercise of the power of said Commission.

5. That the Appellate Court of the State of Indiana erred in affirming the judgment of the Lake Circuit Court of Lake County, Indiana, and in not giving the plaintiff in error its rights under said crossing contract between it and the Chicago, Cincinnati & Louisville Railway Company, which was set forth in the amended petition filed in said Lake Circuit Court.

69 Wherefore, for these and other manifest errors appearing in the record, the said plaintiff in error prays that the judgment of the said Appellate Court of the State of Indiana, be reversed and set aside, and that judgment be rendered in its favor; and it also prays judgment for costs.

SAMUEL PARKER,
ANDERSON, PARKER & CRABILL,
South Bend, Indiana, Attorneys for Grand Trunk Western Railway Company, Plaintiff in Error.

70 [Endorsed:] Filed Dec. 14, 1908. Edward V. Fitzpatrick, Clerk. Anderson Parker & Crabill, attorneys at law, St. Jos. Co. Savings Bank building, South Bend, Ind.

71 STATE OF INDIANA:

In the Appellate Court.

I, Edward V. Fitzpatrick, Clerk of the Supreme Court of the State of Indiana, and ex-officio Clerk of the Appellate Court within and for said State, hereby certify that the within and foregoing is a true, correct and complete Transcript of the record of the proceedings had, papers filed (except briefs and motions), rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in both the Supreme and Appellate Courts of said State, in cause No. 6317, and entitled Grand Trunk Western Railway Company v. Union B. Hunt, et al., appealed from the Lake Circuit Court. Also the original petition for a writ of error and Assignment of Errors in the Supreme Court of the United States filed therewith; also the writ of error from the Supreme Court of the United States to the Supreme Court of the State of Indiana, with the allowance thereof, the original citation of the defendant in error and proof of service thereon, a copy of the original bond and its approval by Hon. Ward H. Watson, Chief Judge of the Appellate Court of Indiana. Which said transcript annexed hereto, together with said original petition for writ of error, and the assignment of errors in the Supreme Court of the United States filed therewith, the original writ of error, original citation, and copy of original bond, I hereby certify as and for my full return to said writ of error.

In witness whereof, I have hereunto set my hand and the seal of said Appellate Court at my office in the State House of Indiana this 24" day of December, 1908.

[Seal Appellate Court, State of Indiana.]

EDWARD V. FITZPATRICK, *C. A. C.*

Endorsed on cover: File No. 21,497. Indiana appellate court. Term No. 138. The Grand Trunk Western Railway Company, plaintiff in error, vs. The Railroad Commission of Indiana, William J. Wood, Henry M. Dowling, John F. McClure, and The Chicago, Indianapolis & Louisville Railway Co. Filed January 26th, 1909. File No. 21,497.

Office Supreme Court, U. S.
FILED.
FEB 27 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1910

No. 138

GRAND TRUNK WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE, AND THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.
DEFENDANTS IN ERROR.

In Error to the Appellate Court of the State of Indiana.

Brief of Plaintiff in Error

SAMUEL PARKER,
Attorney for Plaintiff in Error

ANDERSON, PARKER & CRABILL,
of Counsel.

TRIBUNE PRINTING CO., SOUTH BEND, IND.

Supreme Court of the United States

OCTOBER TERM, 1910

No. 138

GRAND TRUNK WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE RAILROAD COMMISSION OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE, AND THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.
DEFENDANTS IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is in this Court upon a writ of error to the Appellate Court of the State of Indiana, sued out by the plaintiff in error to secure a review of the judgment of that Court affirming a judgment of the Lake Circuit

Court of Lake County, Indiana, in an action brought by the plaintiff in error against the defendants in error in the last named Court.

The following is a succinct statement of the facts that resulted in the bringing of the suit and a brief history of the action. The railroad of the Chicago, Indianapolis & Louisville Railroad Company, defendant in error, commonly and hereinafter called "The Monon," crosses two railroads about four and a half miles south of the city of Hammond, in Lake County, Indiana, at a place called Maynard. One of these railroads, unofficially called "The Panhandle Railroad," is that of The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and the other is that of The Grand Trunk Western Railway Company, plaintiff in error. The Pittsburgh, Cincinnati, Chicago & Saint Louis Railway Company was not a party to the action in the Appellate Court of Indiana and is not a party here.

On May 4, 1905, The Monon Company filed its written petition with the Railroad Commission of Indiana praying that an inter-locking plant be established at each of the crossings of its railroad and the other two railroads, to be operated by means of one tower set between the two crossings. The Railroad Commission of Indiana, pursuant to the Act of the General Assembly of that State, approved February 28, 1905, creating a Railroad Commission and prescribing its duties and powers, entertained this petition and, upon due notice given, met at the place of the crossings, examined them, and adjourned to its offices at Indianapolis, where, on June 12, 1905, the three companies interested appearing, it was found and ordered by the Commission that inter-locking switches should be installed and used at both crossings,

but that the same should be operated by separate towers, one for each crossing. The parts of this order which affect the plaintiff in error and of which it complains are these:

> "That an inter-locking device of some approved and modern manufacture be, and the same is ordered to be, installed at the crossing of the petitioner's railroad with the railroad of the respondent, the Grand Trunk Western Railroad Company, in Lake County, Indiana."
>
> * * * * * * * * *
>
> "It is further ordered that the Y connections and cross-over track of said several roads shall be included within such inter-locking apparatus at the election only of the several roads as they may severally determine."
>
> * * * * * * * * *
>
> "It is further ordered that the expenses of constructing and maintaining such device shall be divided between such railway companies upon the basis of functions of levers used in the operation of the plant for the benefit of the several roads respectively.
>
> "It is further ordered that the expense of operation of the protecting device at the crossing of the Grand Trunk Western Railway Company's track shall be sustained by it and the petitioner upon the same basis as herein provided for expenses of construction and maintenance, excepting that the Commission orders that before any such division of the operating expenses shall be made the petitioner shall contribute and pay thereon the sum of $780.00 per annum, and the remaining expenses shall be so divided."
>
> * * * * * * * * *
>
> "In case the tracks of either of such railroads shall hereafter be increased at the point of crossing,

such inter-locking device shall be improved so as to embrace and protect the additional tracks and the entire expense thereof shall be sustained by the company which lays down the additional tracks and the increased expense of maintenance shall likewise be sustained by such company and the expense of operation shall then be re-apportioned upon the basis of functions of levers after deducting the arbitrary heretofore mentioned, provided that no such addition shall be made to such plant until approved by the Commission."

The plaintiff in error objected and objects to these parts of the order in so far as it was and is required thereby to pay any portion of the cost and expense of installing and operating the inter-locking device for the protection of the crossing of its railroad and that of The Monon Company. The ground of its objection was, and is, that its predecessor, the Chicago & Grand Trunk Railway Company, and the predecessor of The Monon Company, The Chicago & Indianapolis Air Line Railway Company, in the fall of 1880, and at the time when the latter company was building its railroad and desired to construct the same across the railroad of the former, the two predecessor companies made their contract in writing, by which the Air Line Company agreed to construct and maintain the crossing at its own expense forever; that the plaintiff in error and The Monon Company succeeded to the rights and duties acquired and imposed by this contract; and that by the contract the plaintiff in error is relieved of the burden and The Monon Company is charged with the duty of properly protecting and guarding the crossing and, therefore, of installing, maintaining, and operating the interlocker ordered by the Railroad Commission.

This contract will appear further along in this brief.

On July 11, 1905, the plaintiff in error, being dissatisfied with the order of the Commission in the respect and for the reason indicated above, and pursuing the remedy provided by section six of the Act of 1905, above referred to, filed its petition in the Lake Circuit Court for a review of the action of the Railroad Commission. The Commission and the individuals composing it only were made defendants to this petition. Demurrers to the petition were filed by the Commission and by its members, severally, for the separate causes that the petition did not state facts sufficient to constitute a cause of action, and that there was a defect of parties in that the Monon Company was not a defendant. The plaintiff in error confessed these demurrers and was granted leave to amend its petition within ten days. (Rec. 4). Within the time granted, and on September 11, 1905, an amended petition was filed to which the Monon Company was made a defendant (Rec. 4). On October 2, 1905, the Railroad Commission and each member thereof filed a separate demurrer to the amended petition upon the ground that the same did not state facts sufficient to constitue a cause of action. (Rec. 13-14). On the same day the Monon Company filed its motion to dismiss the petition upon the grounds, first, that the Lake Circuit Court had no jurisdiction of the subject matter of the action; and, second, that the action was in the nature of an appeal from an award made by the Railroad Commission and that there was no law authorizing an appeal from such award. (Rec. 14). On December 11, 1905, this motion to dismiss was overruled by the Court (Rec. 15). Then the Monon Company filed its demurrer to the

amended petition for the separate causes, that the Court had no jurisdiction of the subject matter, and that the pleading did not state facts sufficient to constitute a cause of action. (Rec. 15). The Court sustained the demurrer of each of the defendants to the amended petition, without specifying, in the case of the Monon Company, upon which ground. (Rec. 16). The plaintiff in error excepted to each of the several rulings of the Court in sustaining these demurrers, and refused to plead further, but elected to stand upon its amended complaint and its exceptions to the rulings of the Court upon the demurrers thereto. (Rec. 16). Thereupon the Court found for the defendants and against the petitioner or plaintiff, that the latter should take nothing by its petition and that it should pay the costs of the action and rendered judgment upon the finding that the petitioner take nothing by its action and that the defendants recover from the petitioner their costs. (Rec. 16).

The plaintiff in error then prayed an appeal to the Supreme Court of the State of Indiana, which was granted, upon its filing its appeal bond in the sum of $200 within thirty days. This bond was duly given (Rec. 16-17), and on January 27, 1906, the plaintiff in error filed a transcript of the record of the Lake Circuit Court in the cause, in the office of the Supreme Court of the State of Indiana. (Rec. 1). In an opinion handed down on October 25, 1906, the Supreme Court held that the Appellate Court, and not itself, had jurisdiction of the appeal and certified the cause to the Appellate Court. (Rec. 21; 167 Ind., 261).

On May 28, 1907, the Appellate Court affirmed the judgment of the Lake Circuit Court appealed from, and

delivered the opinion which appears in the record. (Rec. 21-28; 40 Ind., App. 168).

On December 14, 1908, the plaintiff in error filed in the office of the Appellate Court of the State of Indiana its petition for a writ of error from this Court to that Court and the allowance hereof by the Hon. Ward H. Watson, the Chief Justice of said Appellate Court. (Rec. 29-33); also the write of error issued out of this Court (Rec. 34). the bond required by the order allowing the write (Rec. 35), the citations to the defendants in error with the acceptance of services thereof (Rec. 36-37) and the assignment of errors in this Court (Rec. 38).

In the Appellate Court the plaintiff in error assigned as errors the several rulings of the Lake Circuit Court in sustaining the demurrers to its amended petition. (Rec. 19).

THE AMENDED PETITION.

Federal Question Raised.

The amended petition (Rec. 5) states that on May 4, 1905, the Chicago, Indianapolis & Louisville Railway Company filed its petition with the Railroad Commission of Indiana, which petition is copied into said amended petiton and is a part thereof and which sets forth the facts relative to the crossings of its railroad and the railroads of the plaintiff in error and of the Pittsburgh, Cincinnati & Chicago Railway Company, and avers the necessity for the installation and operation of an interlocking plant at these crossings and its inability to agree with the other companies on the matter, and asks the Commission to determine the place of the inter-locker

and to fix the proportion of the cost of its construction, maintenance and operation that each company shall be required to pay. The amended petition then sets forth the several steps taken in the proceeding, which resulted in the order by the Commission providing for the construction, maintenance and operation of the inter-locker and the apportionment of the cost and expense thereof between the three companies. This order is copied into and made a part of the amended petition. (Rec. 7). It appears therefrom that the expense of constructing and maintaining the inter-locking device at the crossing of the railroads of the Monon Railway Company and of the plaintiff in error shall be divided between the two companies "upon the basis of functions of levers used in the operation of the plant" and that "the expenses of operation of the protecting device * * * shall be sustained" by the two companies upon the same basis as provided for the expense of construction and maintenance, except that the Monon Railway Company shall pay thereof $780 per annum before the expense shall be so divided. It is then averred that the cost of installing the inter-locker will be $5,000, and that the expense of maintenance and operation will be $1,600 per year.

As heretofore stated, the objection of the plaintiff in error to this order is based upon the contract between the predecessors of the Monon Railway Company and itself in the ownership of the railroads owned and operated by them, respectively, under which the burden of guarding and protecting the crossing in question is imposed upon the Monon Railway Company. This contract was incorporated into and is a part of the amended petition (Rec 9).

It reads as follows:

THE CONTRACT.

"This agreement made and entered into near July 16th, 188—, by and between the Chicago & Grand Trunk Railway, party of the first part, and the Chicago & Indianapolis Air Line Railway, party of the second part, witnesseth:

"That the party of the first part for, and in consideration of the performance by the party of the second part of the stipulation and agreements hereinafter set forth, doth give and grant to the said party of the second part the right to construct and operate the said Chicago & Indianapolis Air Line Railway over and arcoss the right-of-way of the said Chicago & Grand Trunk Railway, at the point where the said Chicago & Indianapolis Air Line Railway, as now located and in process of construction, shall cross the same at or near Maynard Station on the line of the said Chicago & Grand Trunk Railway, which said Railway of the party of the second part shall have constructed, kept, and maintained at a grade on a level with the Railway of said party of the first part at the point of crossing, as above specified herein.

"And the said party of the second part, in consideration of the right to construct and operate the said Chicago & Indianapolis Air Line Railway across the right-of-way of said party of the first part, as above granted and set forth, agrees to construct, put in, and maintain good and sufficient frogs and crossings at the points where the track of the said Chicago & Indianpolis Air Line Railway crosses the track of the Chicago & Grand Trunk Railway, as aforesaid, and should the party of the first part, at any time hereafter, construct and lay down additional track or tracks, at the said point of the intersection, the party of the second part agrees in like manner to construct, put in, and maintain sufficient frogs and crossings to

enable the party of the first part to cross the track or tracks of said second party's railway.

"All of which crossings shall be put in at and upon the grade of the Railway of the party of the first part, and shall be done in a good and substantial manner, so that the party of the first part shall be able to operate its road at that point with convenience and safety, and that said crossings shall be so maintained and kept in repair by the party of the second part at its individual expense forever.

"And the party of the second part further agrees that it will at said point of intersection, erect, put up and forever maintain good and substantial semaphores or other signals and provide the requisite watchmen to take charge of and operate the same, all of which shall be at the individual expense of said party of the second part.

"In witness whereof the parties have hereunto set their hands *that* day and year first above written.

CHICAGO & GRAND TRUNK RY. CO.,
(Signed.) S. R. GALLOWAY, *Gen. Supt.*

CHICAGO & INDIANAPOLIS AIR LINE RY. CO.,
(Signed.) HENRY CRAWFORD, *Gen. Man.*

The amended petition contains appropriate allegations showing that the present companies are, and how they became, the successors in the ownership of their respective railroads, to the original parties to said contract, and that the contract became, and is, the contract between the present companies and was acted upon and strictly observed by the Monon Railway Company for twenty years prior to the time said amended petition was filed.

The said amended petition concludes as follows:

"And the said Grand Trunk Western Railway Company now objects to the order and regulation of

the said Railroad Commission so made relative to the said crossing, and avers that the same is inequitable, unjust, and illegal and in violation of the rights of the said Grand Trunk Western Railway under said contract in this:

"First. That it compels the Grand Trunk Western Railway Company to pay a part of the cost and expense of erecting said inter-locking system and of placing such inter-locking system in operation, including therein all the cost of good and sufficient semaphores and other signals.

"Second. That the order of the Commission provides that before any division of operating expenses shall be made the said Monon Company shall pay to the petitioner herein the sum of $780.00, and the balance of operating expenses be apportioned, whereas, such amount is insufficient to pay the watchman and cost of operating and maintaining signals.

"Third. For the reason that the said amount of $780.00 is fixed arbitrarily and makes no provision for such increase in the manner or cost of keeping watchmen and increased cost of maintaining and operating signals.

"Fourth. In that the order compels the Grand Trunk Western Railway Company to pay a part of the cost of maintaining and keeping in operation all signals of which the said inter-locking system is a part.

"Fifth. That by virtue of the contract aforesaid and the affirmation of the same by the respective parties entering into the same and by their successors, it has become, and is, the duty of the said Monon Company to pay all the cost and expense of keeping in repair, operating, and managing the crossing aforesaid, and all signals and appliances and inter-locking switch that it may be necessary or proper to erect at

the Maynard Crossing aforesaid, in order that petitioner may operate its road with convenience and safety.

Sixth. That the effect of said order, should it be enforced, would be in violation of the Constitution of the United States.

Seventh. That the enforcement of the said order of the Railroad Commission would deprive the Grand Trunk Western Railway Company of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Indiana." (Rec. 11-12).

ASSIGNMENT OF ERRORS.

By its Assignment of Errors in this Court (Rec. 38), the plaintiff in error challenges the decision and judgment of the Appellate Court of the State of Indiana upon these grounds, in substance to-wit:

1. That said Appellate Court erred in deciding and holding that said contract, which was made a part of said amended petition, did not impose the entire expense of installing, maintaining, and operating the inter-locking plant in question, upon the Monon Railway Company.

2. That said Court erred in deciding and holding that the said order of the Railroad Commission of Indiana was a valid exercise of its power, when in truth and in fact such holding annulled the contract and relieved the Monon Railway Company of its obligations thereunder, contrary to Section 10 of Article 1 of the Constitution of the United States.

ARGUMENT.

I.

On Subject of Jurisdiction of This Court.

The writ of error herein ran to the Appellate Court of the State of Indiana. That Court was the highest State Court authorized by the law then in force in the State of Indiana to hear and decide the cause. The appeal from the Court of original jurisdiction, the Lake Circuit Court, was taken to the Supreme Court of the State of Indiana (Rec. 21; 167 Ind., 261). That Court held that it had no jurisdiction and ordered that the cause be transferred to the Appellate Court. The statute then in force, being section 6 of the Act approved February 28, 1905, did not provide for an appeal from the Appellate Court to the Supreme Court. That part of said section 6 authorizing appeals from a judgment rendered by a Circuit or Superior Court in proceedings of the kind involved here, being the last clause of that section, reads as follows: "Either party to said proceedings shall have the right to appeal from the finding and judgment therein to the Appellate Court of Indiana in the same manner that appeals are prosecuted in civil cases from judgments of Circuit and Superior Courts in such cases." The right to appeal exists only when conferred by law. In declaring the rule to be as stated in the last sentence, the Supreme Court of Indiana, in *Lake Erie, etc., R. Co. vs. Watkins*, 157 Ind., 600-605, quoted with approval from *Sullivan vs. Hang*, 82 Mich., 548, as follows:

> "The right to an appeal is, and always has been, statutory, and does not exist at common law. It is a remedy which the Legislature may in its discretion

> grant or take away, and it may prescribe in what cases, and under what circumstances, and from what Courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a Court of inferior jurisdiction, none can be taken."

The federal question was raised by the plaintiff in error in its amended petition, the intial pleading in the record. It is directly averred in this petition (Rec. 12), as follows:

> "Fifth. That by virtue of the contract aforesaid and the affirmation of the same by the respective parties entering into the same and by their successors, it has become, and is, the duty of the said Monon Company to pay all the cost and expense of keeping in repair, operating and managing the crossing aforesaid, and all signals and appliances and inter-locking switch that it may be necessary or proper to erect at the Maynard Crossing aforesaid, in order that petitioner may operate its road with convenience and safety.
>
> "Sixth. That the effect of said order, should it be enforced, would be in violation of the Constitution of the United States."

The foregoing quoted parts of the amended petition are not as pointed and direct as they might be and, perhaps, as they ought to be. But they did serve to call the direct attention of the court to the contention that the necessary effect of the order of the Railroad Commission, if affirmed, would be to relieve the Monon Railway Company of the duties and obligations assumed by it under the contract to the detriment of the plaintiff in error and that this would be in violation of its rights un-

der the Constitution of the United States. The clause of Section 10 of Article 1 reading "No State * * * shall pass any law impairing the obligation of contracts," only could have been meant. That the Appellate Court so understood the amended petition appears from the following statement in its opinion:

> "The ground of appellant's complaint against the order of the Railroad Commission in installing the inter-locking switch at the crossing is that the order, in so far as it apportions the cost and expense of installing the device and maintaining and operating the same, invades the contractual rights of the appellant as against the appellee, the Monon road; that the contract entered into between their predecessors in right, the Chicago & Grand Trunk Western Railway and the Chicago & Indianapolis Air Line Railway, places the entire burden of protecting the crossing upon the appellee, the Monon road, and that the order of the Railroad Commission, requiring appellant to pay any part of this expense, is in violation of the appellant's constitutional right under its contract."

By its ruling in sustaining the demurrers to the amended petition, the Lake Circuit Court necessarily held that the order of the Railroad Commission, whereby a material part of the expense of installing, maintaining, and operating the inter-locker should be borne by the plaintiff in error, did not violate the obligation of said contract. This ruling could be based upon such a construction of the contract only as would exclude from the obligations of the Monon Railway Company the duty of providing, maintaining, and operating the particular safety device required by the order to be installed, maintained and operated; or upon the view that the Railroad Commission had the power, under the Act prescribing its powers and duties, in effect, to amend

the contract. The existence of the contract as between the plaintiff in error and the Monon Railway Company was admitted by the demurrer. Its meaning and effect only were for the determination of the Court. The judgment of the Appellate Court, in affirming the judgment of the Lake Circuit Court, amounted to a sustaining of the demurrers to the amended petition. The basis of the judgment of the Appellate Court may be known from its opinion. It appears from this opinion (Rec. 27) that the judgment of the Appellate Court was founded upon a construction of the contract which excluded from the obligations of the Monon Railway Company thereunder the obligation to guard and protect the crossing by and through the means prescribed by the Commission by its order. That Court having reached the conclusion that the contract would not bear the construction contended for by plaintiff in error did not feel called upon to determine whether the Act of February 28, 1905, impaired the obligations thereof. Indeed, there was then no occasion for it do so. But suppose the Court had reached the conclusion that the contract meant what the plaintiff in error insists it meant and means, namely, that by its terms the Monon Railway Company was bound to install, maintain, and operate the inter-locker or any other device, which in the progress of invention, and under circumstances that might come into existence, might become appropriate to the guarding and protecting of the crossing. Then the Court would have been forced to say, in disposing of the cause, whether the Act of 1905, impaired the obligations of the contract.

The decisions of this Court are uniform in their holding that, "If the State Court gives effect to a subsequent law, which is impugned as impairing the obliga-

tions of a contract, this Court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

Huntington vs. Attrill, 146 U. S., 657-684; 13 Sup. Ct., 224.

New Orleans Waterworks Co. vs. Louisiana Sugar Refining Co., 125 U. S., 18, 38; 8 Sup. Ct., 741, 752.

Railroad Co. vs. Alsbrook, 146 U. S., 279, 293; 13 Sup. Ct., 72.

Chicago B. & O. R. Co. vs. Nebraska, 170 U. S., 50; 18 Sup. Ct., 513, 517.

ARGUMENT—(Continued).

The Merits.

As already appears, the contention of the plaintiff in error is, and always has been, that, under the contract, the Monon Railway Company is obligated to protect and guard the crossing; and the fact that the means and methods of protecting and guarding railroad crossings have changed since the contract was entered into can make no difference and does not lessen or change the obligation. Neither does it make any difference that the means and method of protecting and guarding the crossing are prescribed by Act of the State Legislature or by the State's agent, the Railroad Commission, to which, in the given case, the power to prescribe the ways and means, is delegated.

This contention must stand or fall in accordance with the construction given to the contract by this Court. The contract should be considered in view of the positions of the parties to it at the time of its execution, the occasion which gave rise to it, the designs and purposes of the parties in making it and the obvious object desired to be accomplished by it. Addison on Contracts (Ed.) Vol. 1, Sec. 182; *Torrence vs. Shedd*, 156 Ill., 194; *Chicago, etc., R. Co. vs. Denver, tc., R. Co.*, 12 Sup. Ct. R., 479; *New York, etc., R. Co. vs. Grand Rapids, etc. R. Co.*, 116 Ind., 60; *Cravens vs. Eagle, etc., Co.*, 120 Ind., 6-11.

It appears from the contract itself (Rec. 9) that, when the parties entered into it, the railroad of plaintiff in error was built and in operation. It farther appears therefrom that the railroad of the Monon Railway Company was merely "located and in process of construction."

The statutes in force in Indiana when the contract in question was made, relating to the crossing of one railroad by another were, first, the Sixth Clause of Section 13 of the Act of May 6, 1853 (R. S. 1881, Sec. 3902), which reads as follows: "Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions expressed in the special powers following: * * *

> "Sixth. To cross, intersect, join, and unite its railroad with any other railroad before constructed, at any point on its route and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is, or shall, be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities

aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners, to be appointed as is provided hereinafter in respect to the taking of lands; but this section is not to affect the right or franchises heretofore granted."

And, second, the Act of March 7, 1873, (R. S. 1881, Sections 3904 and 3905), reading as follows:

"3904. Crossing railroad track. 1. Where it becomes necessary for the track of one railroad company to cross the track of another railroad company, the company owning the road last constructed at such crossing shall, unless otherwise agreed to between such companies, be at the exclusive expense of constructing such crossing in a manner to be convenient and safe for both companies."

"3905. Repairs of crossings. 2. Whenever such railroad crossing is constructed in the manner provided for in the preceding section, it shall be the duty of each company, respectively, to maintain and keep in repair its own track, so as all times to provide a ready, safe, and convenient crossing for all locomotives or trains passing on either road at such point."

The sixth clause of the Act of 1853 does not purport to regulate the manner or means of guarding a crossing. It recognizes the right of the railroad company, whose road is in existence, to receive compensation from the railroad company constructing its railroad for the crossing. It provides that, if the two corporations can not agree upon the amount of compensation to be made for the crossing or upon the point or manner of the crossing and connection, the same shall be determined by commissioners.

Section 1 of the Act of 1873 provides that the railroad company owning the railroad last constructed shall, unless otherwise agreed upon by the two companies, be at the exclusive expense of constructing the crossing in a manner convenient and safe for both companies. Section 2 requires each company to keep in repair its own track at the crossing. No other Act of the General Assembly of the State of Indiana, in force when the contract involved here was executed, touched, even remotely, the subject of the crossing of one railroad by another. By the statutes quoted these burdens and disadvantages were imposed upon railroad companies proposing to construct their railroads across existing railroads; they were required to make compensation for the crossing, and, in the absence of an agreement, were forced to resort to condemnation proceedings. They were required to bear the total expense of constructing the crossings. in a manner to make the same convenient and safe for both companies. With the law as just stated, the predecessors of the companies contending here made the contract. In considering a similar contract, for a purpose other than the purpose for which this one is being considered, the Supreme Court of Indiana, in *New York, etc., R. Co. vs. Grand Rapids R. Co.*, 116 Ind., 60, used this language: "The contract between the parties must be construed with reference to the surrounding circumstances and the object the parties intended to accomplish. It is obvious that what the parties intended was that the appellant should secure a way across the track of the appellee, and should provide means of making and keeping the crossing safe for the use of both parties."

In the case at bar, as already stated, it appears that the railroad of the predecessor of the plaintiff in error had been constructed and was in existence when this contract was

executed, and that the predecessor of the Monon Railway Company desired the crossing. The contract does not mention any money consideration. Condemnation proceedings were avoided. The company owning the existing railroad granted to the other company the right to cross its railroad at a specified point. For this the other company agreed to put in and maintain good and sufficient frogs and crossings and to maintain and keep the same in repair forever, and, further, to "erect, put up, and forever maintain good and substantial semaphores *or other signals* and provide the requisite watchman to take charge of and operate the same, all of which shall be at the individual expense" of the crossing company. From the part of the contract just quoted it seems to be perfectly plain that one of the chief objects of the parties to it was to provide for the guarding and protecting of the crossing by the company desiring to cross and its successor for all time. The agreements by the Air Line Railway Company, predecessor to the Monon Railway Company, were "to construct, put in, and maintain good and sufficient frogs and crossings" and to erect, put up, and *forever* maintain good and substantial semaphores *or other signals* and provide the requisite watchmen to operate the same." The Appellate Court of Indiana, in passing upon the words last quoted, treat the word "semaphores" as being an adjective, qualifying the word "signals." The expression used by that Court is, "the only part of the contract that has reference to the guarding of the crossing is that part providing for the erection at the point of intersection, and the maintenace of good and substantial semaphore signals." (Rec. 28). It may be conceded that, if the words "semaphore signals," had been used in the contract as the Court uses them in the opinion, the Court's conclusion is

correct. But they were not so used. The contract requires the erection and maintenance of semaphores *or other signals*, thereby clearly evidencing the fact the parties had in mind, that while semaphores were then recognized as practical and efficient means of guarding railroad crossing, science and invention might supply other and more efficient means. It must be admitted that all the words of the contract should be given force and effect. The original parties to the contract certainly meant something when they wrote into it the words "or other signals." Could they have meant that these words should drop out of the contract whenever the kind of signals specifically provided for should cease to be used from any cause, or did they mean that, whenever it became necessary to use other signals, the Air Line Company or its successor should use them? The obligation to guard the crossing is to continue for all time. The parties to the contract must be presumed to have had it in mind that the soverign power, the State, might require that other means than semaphores be used to guard the crossing. The obligation to efficiently guard the crossing, imposed and assumed by the contract, can not be removed by the requirements of careful and skillful railroading as the same may be developed by invention or by the requirements of the State. Otherwise the words "or other signals," as used in the contract, may come to have no meaning. The fact that the inter-locking device involves more than mere signals can make no difference. The intent of the parties, as disclosed by the contract, should govern. That intent was that the Air Line Company and its successors should guard the crossing. The interlocker is required because it will more effectively guard the crossing than it could be guarded by semaphores.

Little, if any, aid can be had from precedent in the decision of this case. We believe that, upon the well established principles applicable to the construction of contracts, the Appellate Court of the State of Indiana erred in its conclusion, and that its judgment ought to be reversed.

Respectfully submitted, by

SAMUEL PARKER,

Attorney for Plaintiff in Error.

ANDERSON, PARKER & CRABILL,

Of Counsel.

January 30, 1911.

INDEX TO BRIEF.

	Page.
Statement of the case	1
Pleadings which raises federal question	7-12
Assignment of errors	12
Argument on proposition that federal question was raised	13-17
Argument on merits and authorities	17-24

Office Supreme Court, U. S.
FILED.
MAR 20 1911
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1910.

No. 138.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE RAILROAD COMMISSION, OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE and the CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Defendants in Error.

IN ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

BRIEF OF DEFENDANTS IN ERROR.

E. C. FIELD,
H. R. KURRIE,
ATTORNEYS FOR DEFENDANTS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE RAILROAD COMMISSION, OF INDIANA, WILLIAM J. WOOD, HENRY M. DOWLING, JOHN F. McCLURE and the CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Defendants in Error.

No. 138.

In Error to the Appellate Court of the State of Indiana.

BRIEF OF DEFENDANTS IN ERROR.

ARGUMENT.

THE STATUTE LAW OF INDIANA RELATING TO RAILWAY CROSSINGS.

By Section 13 of an Act approved January 20, 1852, it is provided that one railroad company may construct its track over and across the line of another railroad company.

Burns Revised Statutes, 1908, No. 5195.

By Section 1 of an Act approved March 7, 1873, it is provided that when one railroad company crosses the track of another in the construction of its road it shall at its own expense construct the crossing "in a manner to be safe and convenient for both companies."

Burns R. S., 1908, No. 5222.

By Section 2 of this Act it is provided that whenever the crossing is constructed, as provided in Section 1—

> "It shall be the duty of each company, respectively, to maintain and keep in repair its own track, so as at all times to provide a ready, safe and convenient crossing for all locomotives or trains passing on either road at such point."

Burns R. S., 1908, No. 5223.

It is averred in this complaint that in 1880 the line of railway now owned by the defendant in error was being constructed over the line of railway now owned by the plaintiff in error. That the two companies entered into a contract giving the former company the right to cross, and providing that it should, as a consideration for this right, put in a good and substantial crossing and thereafter maintain the same.

It was also provided in this contract:

> "And the party of the second part further agrees that it will at said point of intersection erect, put up and forever maintain good and substantial semaphores or other signals and provide the requisite watchman to take charge of and operate the same, all of which shall be at the individual expense of said party of the second part."

After this contract was entered into in September, 1881, there went into force a law in the State of Indiana which provided:

> "Whoever, being the engineer of any locomotive running upon any railroad track upon or over which passengers are or may be transported, runs his locomotive across or upon the track of any other railroad upon and over which passengers are or may be transported, without first coming to a full stop before crossing such track, * * * shall be guilty of a misdemeanor."
>
> Burns R. S., 1904, Sec. 2293.

March 2, 1883, there went into force a law which provided that where two or more railroad companies crossing at common grade should

> "by a system of interlocking or automatic signals, or by any other works or fixtures to be erected by them, render it safe for engines or trains to pass over such crossing without stopping,"

and this system of interlocking works was approved by the auditor of state, then, when it was installed, trains might be run over such crossing without stopping.

There was no provision in this law, nor in any law which had been passed up to that time whereby the installation of any interlocking device or any protection might be compelled. What the law provided was simply that where railroad companies entered into an agreement to protect the crossing, and this particular protection was approved by the auditor of state, then the trains could run over the crossing without stopping, notwithstanding the provision of the statute of 1881 above referred to.

The law remained thus until March 8, 1897. A law then passed goes one step further than the law of 1883. It provides that one railway company may file its petition with the auditor of state requesting that a system of interlocking works be required for the protection of a particular crossing.

Section 3 of this Act provides:

> "That in case where the tracks of two or more railroads, or the tracks of a railroad and an electric railroad cross each other at common grade in this state, any company owning any one of such tracks, whose managers may desire to unite with others in protecting such crossing with interlocking or other safety devices, and shall be unable to agree with such others on the matter, may file with the said auditor a petition stating the facts of the situation and asking said auditor to order such crossing to be protected by interlocking, or other safety devices; said petition shall be accompanied by a plan showing the location of all tracks and switches, and upon the filing thereof, notice shall be given to each company or persons owning or operating any track involved in such crossing, and the said auditor thereupon view the site of such crossing, and shall, as soon as practicable, appoint a time and place for the hearing of such petition. At the time and place named for hearing, unless the hearing is for good cause continued, said auditor shall proceed to try the question of whether or not the crossing shall be protected by interlocking or other safety devices, and shall give all companies and parties interested an opportunity to be fully heard; and after such hearing said auditor shall enter an order upon a record book or docket, to be kept for that purpose, granting or denying such petition; and in case the same is granted, such order shall prescribe the interlocking or other safety devices for such crossing and all other

matters which may be deemed proper to the efficient protection of such crossing, and in such order the auditor shall designate the proportion of the cost of the construction of such plant and the expense of maintaining and operating the same, which each of the companies or persons concerned shall pay, and shall also fix the time within which such appliance shall be put in, such time, however, not to exceed ninety days from the making of such order."

Subsequent to this, by an act approved February 28, 1905, the Railroad Commission was created in Indiana with authority, among other things, to hear complaints such as are provided for by the section above quoted. This Railroad Commission law, Section 3, provides in part:

"And the authority now vested in the auditor of state under the laws of this state with reference to the crossings of railroads by other railroads, or by railroads operated by electricity, and the installation and maintenance of interlocking appliances at such crossings is hereby vested in the Commission."

The Act of 1897, above referred to, by its fourth section imposes the absolute duty upon railroads thereafter constructed to protect all crossings with a full system of interlocking works to the satisfaction of the auditor of state, and to bear the entire cost of the installation of the same and the expense of future maintenance and operation.

This controversy arose by the Chicago, Indianapolis & Louisville Railway Company filing with the Railroad Commission of Indiana a complaint under Section 3 above mentioned, asking the Commission to enter an order requiring the crossing of its line

and the line of the plaintiff in error in this case to be protected by a system of interlocking works.

This statute requires the Railroad Commission to hear this complaint, and to hear all that the parties interested have to say respecting the same. It has authority to grant the petition, or to deny it, and in the event it is granted, it is the duty of the Commission to

> "prescribe the interlocking or other safety devices for such crossing, and all other matters which may be deemed proper to the efficient protection of said crossing."

At the hearing the Commission granted the relief prayed and provided for a division of the expense.

The Complaint.

Plaintiff in error filed its complaint in the case at bar calling in question the validity of that order.

In this complaint plaintiff in error avers that the defendant in error did file a petition with the Railroad Commission of Indiana, asking that the Commission enter an order requiring the two companies to interlock this crossing so that trains might pass over the same without stopping. It is averred in this petition, as appears from the complaint herein:

> "That it is important for the safety of the traffic and the traveling public on all of said lines to have installed an interlocking plant at said crossing." (Page 5.)

It is averred that the Commission acted upon this complaint, and after a hearing, such as the statute provides for, entered an order requiring the installation of interlocking devices as prayed. In the or-

der of the Commission it appears that the defendant in error was first required to pay out of the expense of operation $780 per annum, and only the balance remaining should be divided between the two companies. (Page 8.)

It appears from the record in this case that the reason why this order was entered in this case was because of a contract between the two companies, hereafter referred to, which required the Monon Company to expend about $780 per year. And in order that the Monon Company might not gain by being relieved of the duty of performing that contract by the order entered in this case, the amount which it was compelled to pay out from time to time in performance of that contract was charged arbitrarily to it before any division of the expense was provided for. (Page 28.)

The agreement entered into between the two companies, as above stated, is set out in the complaint. Following this it is averred:

> "And that said Monon Company for about twenty years has paid all of the costs and expenses of keeping, maintaining and operating said crossing, and providing a watchman therefor, and giving proper signals and taking other precautions necessary for the safety of the public and the protection of the property of said two railroad companies in crossing one another at said Maynard crossing."

It thus appears that the Monon Company has for twenty years faithfully performed the conditions of this contract. (Page 11.)

Two questions arise for consideration. First, what does this contract mean?

It is contended by the plaintiff in error that this contract means that the Monon Company shall put in and maintain a full system of interlocking works such as is required by the order of the Commission in this case. The contract only requires the Monon Company to put in and maintain "good and substantial semaphores or other signals, and provide the requisite watchman to take charge of and operate the same." It does not require the Monon Company to protect this crossing. It does not require the Monon Company to put in from time to time more improved methods for protecting railroad crossings. It requires it to do one thing and only one thing, and that is to maintain semaphores or other signals. It is true, as averred in the complaint, that a system of interlocking works is very much more than a signal. There is a derailing device in the track of each company. The interlocking works are so constructed that when the crossing is open for one railway it must be closed against the other. In other words, just as its name implies, it interlocks, so that the track cannot be safe for both lines at the same time. This is not due at all to the presence of the signals, but it is due to the arrangements which there are for locking the tracks and providing for derailment in case of an attempt to use the crossing by the line against which the track is closed. The signals only indicate the condition of the derails. This appears also from the complaint. (Page 11.)

Plaintiff in error is claiming this sort of a device under a contract which makes no provision for it. Furthermore, apart from the general language of the contract itself, we have the fact that defendant

in error has performed the conditions of this contract for twenty years. There is nothing to show that there has ever been any objection on the part of the plaintiff in error to the protection which was afforded by the defendant in error in performing this contract. Indeed, as we have seen, it is expressly averred that at the time the complaint was filed the contract was being fully performed. There is not now, and never has been, an interlocking device at this crossing, but simply, as the complaint avers, a signal and a watchman. Under the laws of Indiana, the trains of the plaintiff in error had to stop at this crossing. It could not be avoided except by putting in a system of interlocking works, either by agreement, or upon the order of proper authority. So that the plaintiff in error here is in the attitude of saying that for twenty years it has stopped its trains at this crossing, that for twenty years all of the protection which this contract has required has been given, and yet that during all of this time it might have demanded this higher protection, the use of which would have avoided making any of these stops.

There is a principle of construction that is so well settled as to now be regarded as elementary, which disputes, in the light of this conduct of the parties, the claim of the plaintiff in error here. The principle is well stated by this court in the case of the *Brooklyn Life Insurance Company of New York* v. *Dutcher*, 95 U. S. 269. Speaking in that case, the court says:

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a con-

> tract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.''

The same point is stated by this court in the case of *Topliff* v. *Topliff*, 122 U. S. 121. Speaking there by Mr. Justice MATTHEWS, the court says:

> ''In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself; and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.''

In the light of this statement of the principle, it seems clear to us that the plaintiff in error is not now in a position to insist that the contract requires of the defendant in error any more than it has been doing during the twenty years last passed. The defendant in error has, by its action from time to time, offered this device as a performance of the contract. It has been accepted as such by the plaintiff in error, and there is nothing in the complaint to show that

there ever has been any objection to the protection as being insufficient as a compliance with the contract.

Furthermore, it is fair to presume that if the two contracting parties had intended any other or additional protection, they were sufficiently advised by counsel to have said so in the contract which was entered into. This is not a contract between individuals with reference to an unimportant matter, but it is a contract between large corporations which are usually advised by counsel, and it related to conduct which might continue during the life of the two corporations.

The Effect of the Contract Upon the Right of the Commission to Enter an Order.

The statute which we have quoted, which provides for the installation of interlocking devices, was not adopted merely for the sake of the convenience of the two companies. The public is interested in safe and rapid transportation. If the interlocking device is not installed, the trains of the two companies must come to a full stop upon approaching the crossing. The public interest in rapid train movement may be sufficient in itself to justify some action under the police power which will avoid these delays. As a necessary part of the action to the end that these delays may be avoided is the right and duty to prescribe some additional protection. Under this statute, it is made the duty of the Commission to require the installation of a system of interlocking works and to apportion the expense according to the justice of the case. The proceeding is not one for the enforce-

ment of a private contract, and we do not believe that a private contract can be of any influence in determining the proper judgment of the Commission.

Take it here, suppose the two companies had actually entered into a contract by the terms of which one was to install and operate this interlocker. Suppose that that company was declining to do it. A suit for specific performance would not lie, because this would require the constant supervision of a court of equity. A suit for damages for breach of contract would not help, because the public is interested in the protection. This law provides a method whereby the public interest is guarded, and the needed protection secured. It does not matter what private contracts the parties may have made. The statute has pointed out the way whereby the protection may be secured where the conditions are such as to require it in the interest of the general public.

It has been repeatedly held in cases of this sort that the public interest cannot be influenced or affected by private contracts. This rule is well stated in the case of *Chicago, etc.* v. *State of Nebraska, ex rel.*, 170 U. S. 57. Speaking in that case at page 72 the court, by Mr. Justice SHIRAS, says:

> "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing in matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created

for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

In that case the court was considering a contract entered into between the City of Omaha and the railway company appealing. It related to the protection of a public crossing. The railroad company was relying upon the contract in its attack upon the validity of a law of the state which put upon it the entire burden of protecting the crossing. In the course of the discussion the court assumed, for the sake of argument, that the contract did provide for a division of the expense, but said, notwithstanding this:

"However this may be, we think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves,

> to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature."

It does appear in the case at bar that the Railroad Commission gave effect to this contract. It charged arbitrarily against the Monon Company the expense which it was incurring from year to year in furnishing the protection which the contract provided for, and which is rendered unnecessary by the installation of the interlocker. Absolutely the only objection made by counsel to this method of giving effect to the contract is in the statement that it does not provide for possible increases in cost of maintenance and operation. However, the law creating the Railroad Commission of Indiana contains this provision:

> "The Commission shall have authority to grant rehearings in any case in which it has made a final order, or to alter, change or modify an order made by it."

So that when the conditions change either insofar as the protection is concerned or the expense of operation is concerned, the Commission has the right to take up the question for further consideration. However, the Commission had before it the expense of this company extending over a period of twenty years. It would hardly be assumed that it would cost this company any more in the future than in the past to maintain this signal and employ the watchman provided for. The cost of maintaining and operating an interlocker is entirely beside the question. Full effect is given this contract by charging against expense of operation the amount

which it would cost the Monon Company to comply with this contract. There is no claim that that amount would fluctuate.

The court will see by reading carefully the decision of the Appellate Court that that court held that by the method by which it arrived at the division of the expense the court did give full effect to the contract as interpreted by it. (Page 28.)

We respectfully urge that there is no error in the decision of this case.

Respectfully submitted,

E. C. Field,
H. R. Kurrie,
Attorneys for Defendant in Error.

The opinion of the Railroad Commission of Indiana in this case is very thorough, and of itself presents an argument conclusively demonstrating the correctness of the conclusion of the commission. We do, as a part of this brief, and for the further information of the court, include this opinion in our brief just as it was rendered by the commission. It is as follows:

June 12, 1905.

Chicago, Indianapolis & Louisville Railway Company,
Petitioner,
vs.
Grank Trunk Western Railway Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company,
Respondents.

No. 1.

E. C. Field for Monon.

Geo. E. Ross for Pennsylvania.

Anderson, Du Shane & Crabill for Grand Trunk

This is a proceeding by the petitioner against the respondents, instituted under Section 5158c R. S. 1901 for the purpose of having the crossings of the petitioner's and respondents' roads protected as provided for in such section. The petition was filed May 4, 1905, notice issued and a hearing fixed for the City of Hammond on May 19, 1905. On that date the Commission viewed the site of the crossings and heard the evidence and continued the proceeding for the purpose of enabling the parties to file expense data and briefs. The briefs and data being now before the Commission, the cause is now determined in the following opinion by McAdams, Commissioner.

In Lake County, in this state, at Maynard Station, near the City of Hammond, the petitioner's railroad (Monon) runs in a northerly direction and consists of a single track. The respondent, Grand Trunk Western's railroad, at that point, runs in a

southeast direction and consists of two tracks. The respondent, The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company's railroad (Pan Handle) at such point, also runs in a southeast direction but at a different angle and consists of two tracks. Each of these roads cross the others at such point, and in crossing form a tri-angle, two sides of which each approximate two thousand feet in length, and are formed by the Grand Trunk tracks and the Pan Handle tracks. The other side of the angle is about fourteen hundred feet long, and is formed by the Monon track. The crossing of the Pan Handle and the Grand Trunk, at one of the angles, is now protected by a mechanical interlocking plant, and is not involved in this proceeding. The only protection now provided for the other crossings are gates and watchmen. The petitioner runs, approximately, twenty trains over these crossings each twenty-four hours, and the respondent companies each run, approximately, thirty trains over their crossing every twenty-four hours. As provided by law each of these trains must now stop before running either of these crossings. According to the proof it now costs $780 per annum to maintain the watchman at the Grand Trunk crossing and $900 per annum to maintain the watchman at the Pan Handle crossing. These crossings are in the open country and on level ground and the view is not obstructed in any direction within signal distance of interlocking apparatus, as now usually installed, excepting by a few trees growing upon the lands enclosed by the tracks. The companies do not own the lands enclosed within the angle or any of the other lands contiguous to the crossings other than the ordinary

right of way. The lands along the tracks of each of the roads and within the angle are controlled by private parties and are subject to their disposition and improvement without consulting the companies. The parties all agree that some modern device should be installed at this point to protect these crossings, and that the system now in use is antiquated insufficient and insecure and interferes with the traffic of the companies. In this view the Commission heartily concurs and determines that such crossings should be protected in some appropriate and modern manner.

The Monon contends that both crossings should be protected by one plant, located on its line, midway between and about seven hundred feet from each crossing. It is conceded that if one plant is used to control both crossings that it would have to be an electric power machine and it would cost from seventeen to nineteen thousand dollars to install such a plant, and it would cost, annually, ten per cent. for the maintenance, and that the annual cost of operation would be about $2,300. On the other hand, it is claimed by the Grand Trunk and Pan Handle roads that it is not advisable to protect both crossings with one plant because of the difficulty in seeing approaching trains on their roads in time of fogs, which prevail in that vicinity, and on account of the liability of the contiguous property to be improved with structures, which would obscure the view of the towerman in signaling trains, and for the reason that the crossing can be better protected by a plant at each crossing where the operator will have a clear vision over all the tracks which he con-

trols. It appears in the proof that a mechanical interlocking plant will be sufficient, if one is installed at each crossing, and that such plant at the Pan Handle crossing will cost about $7,000 and the annual expense of maintenance will be about $700, and that the annual expense of operation would be about $1,600, and that a mechanical plant can be installed at the Grand Trunk crossing for about $5,000 and that the annual expense of maintenance would be about $500 and the annual expense of operation would be about $1,600. It appears from this data that while the cost of one power machine, to protect both crossings, would be approximately $7,500, more than the cost of two mechanical plants, one for each crossing, and that the annual cost of maintenance of one power machine would be $750 in excess of the annual cost of maintaining two mechanical machines, yet it appears that the annual cost of operating two mechanical machines would be about $900 more than the annual cost of operating one power machine. It is contended that the use of one power machine to control both crossings is the better economy, although the initial cost is greater. This is possibly true. If the lesser price of $17,000 is used as a basis of calculation, it appears that in a period of years the extra cost of installation and maintenance will be taken care of by the lesser expense of operation. However this may be, and it is a question that cannot be solved with certainty, it does not appeal to the Commission as against the other facts which are subject to absolute determination. None of these companies should be satisfied with less than the best. The items of expense of installation, maintenance and operation, in the judgment of the

Commission must go down before the factor of safety to the roads and the public wherever the same are in conflict. It is beyond controversy that if two machines are installed, one to control each crossing, they will afford complete protection to the roads and the public, as well, not only for the present, but for all future time, as the same may be constructed at the crossings and on the lands of the companies and in each manner as to bring into view all the present tracks and such as may be hereafter laid down within the present limits of the roads' ownership. On the other hand, if a power machine is installed, midway between the crossings, it appears that there is doubt as to its efficiency at times, under certain conditions, which prevail in the locality. And an insurmountable objection to such solution as it appears to the Commission, is the fact that the contiguous property, in all directions, over which the vision of the towerman must pass, to safely, properly and satisfactorily perform his duty, is not subject to the control or supervision of the railroad companies, but is subject to the control and disposition of private parties. They may plant it in groves, turn it into parks, plat a village or build a city or construct factories or business blocks, along the lines of railroad, any one of which would destroy the usefulness of a power machine so erected, in so far as it was intended to properly control the Pan Handle and Grand Trunk tracks.

The only answer made to this view of the case is the use of enunciators on these roads but the Commission is satisfied that such device would not give to these roads that consideration, protection and

safety, which their interests, as through trunk lines, with the greater wheelage, demands at the hands of the Commission, and the Commission therefore determines that it is the better policy to install a separate machine for each crossing.

This being the first case to come before the Commission under this statute, it becomes important to determine upon what basis to divide the expenses of installation, maintenance and operation of the interlocking plants. These roads having been constructed prior to the Act of March 8, 1897 (Burns R. S. 1901, Secs. 5158a to 558h) this proceeding is not controlled by Section 4 of that act, which places the entire expense upon the junior road. Therefore some basis, founded upon reason, must be declared by the Commission upon which these expenses should be divided. The basis used should be founded upon fixed facts and predicated upon factors incident to the plant, if otherwise just and reasonable, which are not subject to change or modification, without at the same time, likewise and in like proportion changing the expense account. A basis for dividing the expense of construction, maintenance and operation, especially the latter, which is predicated upon premises subject to constant change and variation, would be unsatisfactory to the Commission, and would be a source of possible dispute between the roads. A basis of the first class, and one satisfactory to the Commission and just to the roads, is found in the physical facts surrounding the plant.

A basis of the second class, which is not satisfactory to the Commission, for the reasons stated, is found in the wheelage of the companies, or trains

passing over the crossing. The protecting device is constructed for the purpose of facilitating the dispatch of trains, to protect them in transit and to protect the public who use the cars for travel and to transport their goods and wares. Within the limits of interlocking distance the device is intended to furnish protection to each track, switch, Y or cross-over track of each company included in the plant. A certain number of levers, with certain fixed functions, all of which are subject to actual determination, are necessary to furnish the protection required. When a certain number of tracks, switches, Ys and cross-over tracks are to be embraced within the interlocking plant, then the number of levers and their functions is subject to absolute and ready determination. If the division is made upon a wheelage or train basis, no such certainty or continuity of conditions is obtainable. There may be ten trains per day this year and fifty trains per day next year. It appears to the Commission that it is not a question of present or future use, but a question of capacity for use as to main tracks and a question of convenience to the road which has seen fit to bring switches, Ys and cross-over tracks within the interlocking territory. Therefore, the Commission, as now advised, determines that the proper basis for the division of these expenses is the service rendered to each road for its protection, and that such service shall be determined by the levers used and their functions in securing such control and protection. Aside from certain contracts, which we will notice presently, there is no serious contention that this is not the proper rule as to installation and maintenance, but a different rule, is insisted upon, as to

the expenses of operation in that the Pan Handle claims that such expense should be divided equally between the roads whose crossing or crossings are interlocked, claiming that the expense of operation does not vary with the increase or decrease of the number of levers or, at least, not in the same proportion.

The Commission is not impressed with this contention. In a certain sense that part of the plant on each road is the property of the road. It certainly owns a portion of the plant equal to its proportion of the expense of construction. It should maintain and keep in repair its portion of the plant for that reason, and so much is conceded. The levermen, the lampmen, the lamps, the oil, the waste, the fuel, the furniture, and all needed supplies, performed duties and supply needs in the operation of the plant and for the benefit of the roads in the same proportion as the plant furnishes them protection. Why should one road pay for one-half the oil supply for the signal lamps if only one-third of them are out for its protection and two-thirds of them out for the protection of the other road? Why should one road pay one-half of the charges for levermen, who may operate sixty levers at various times during the day, twenty of which control its road and forty of which control the other road? Why should one road pay one-half of the expense of looking after and caring for and keeping in repair a plant of which it only owns and uses one-third?

The wheelage may, and probably does, affect this question, but as already stated, a basis of that kind is so changeable, from day to day and year to year,

that it is an unsatisfactory basis upon which to predicate a rule for present or future conduct and the Commission therefore declines, as now advised, to permit it to have controlling influence in this case, and therefore holds that the proper basis for the division of operating expenses, unless there be special reasons in the particular case, should be the same as that imposed for construction and maintenance.

The Pan Handle and the Grand Trunk are the senior roads and were in operation at the time the Monon was constructed at this point, which was in the year 1882. Soon after the crossing of the Pan Handle a contract was entered into between the Pittsburg, Cincinnati & St. Louis Railway Company, operating the Columbus, Chicago & Indiana Central Railway, under orders of the Federal court, and the Louisville, New Albany & Chicago Railroad Company. By the terms of this contract these companies agreed to share equally in the maintenance of the crossing but the contract does not provide for the expense of the original construction. The companies also agree to share equally in the cost of installing, maintaining and operating such crossing signals as may be agreed upon between them.

At some time, the particular day being in dispute, but before what is now the Monon Railroad, crossed what is now the Grand Trunk Western Railroad, a contract was entered into between the Chicago & Grand Trunk Railway Company and the Chicago & Indianapolis Air Line Railway Company. In this contract we find the following stipulations:

"And the said party of the second part

(Monon) in consideration of the right to construct and operate the said Chicago and Indianapolis Air Line Railway across the right of way of said party of the first part (Grand Trunk) as above granted and set forth, agreed to construct, put in and maintain good and sufficient frogs and crossings at the points where the track of the said Chicago & Indianapolis Air Line Railway crosses the track of the Chicago & Grand Trunk Railway as aforesaid, and should the party of the first part at any time hereafter construct and lay down an additional track or tracks at the said point of intersection, the party of the second part agrees in like manner to construct put in and maintain sufficient frogs and crossings to enable the party of the first part to cross the track or tracks of said second party's railway. All of which crossing shall be put in at and upon the grade of the railway of the party of the first part and shall be done in a good and substantial manner, so that the party of the first part shall be able to operate its road at that point with convenience and safety, and that said crossing shall be so maintained and kept in repair by the party of the second part at its individual expense forever. And the party of the second part further agrees that it will at said point of intersection, erect, put up and forever maintain good and substantial semaphores or other signals and provide the requisite watchmen to take charge of and operate the same, all of which shall be at the individual expense of said party of the second part."

It is contended by the Pan Handle that the contract as above mentioned, must control the division of expenses of the operation of any protecting device which the commission shall order in this proceeding for its crossing. It is contended by the Grand Trunk that the second contract, from which we have quoted, must control the division of the ex-

pense of installation, maintenance and operation of any protecting device which the Commission shall order in this proceeding for its crossing, and that, by the terms of the contract, all of such expenses shall be sustained by the Monon. The Monon contends that as these contracts were not executed by the companies now before the Commission and which now own and operate these roads, that, therefore, they are not of controlling influence in the cause. It appears from the statements of counsel and available railroad history that the present owners of these roads have acquired their respective titles, either by consolidation or foreclosure and sale of the properties of the former companies which owned the respective properties at the time these agreements were made. We are not informed as to the steps taken in the proceeding to foreclose and sell, looking to the transfer of these contract rights and obligations with connecting roads. We take it that the same rights and liabilities will be long and attach to any company created by consideration as were possessed by and devolved upon the constituent companies.

Railway Co. v. *Boney*, 117 Ind. 501.
Cashman v. *Brownlee*, 128 Ind. 266.

From the evidence it appears that the companies now before the commission have been and are now observing these contracts and are maintaining the crossings and present signal systems and paying the expenses thereof in accordance with the terms of these agreements and have been so acting ever since the present companies came into existence and possession of the properties. It is a well known prin-

ciple of law that an interpretation placed upon a contract by each of the parties thereto is a safe guide for those to follow who are called upon to enforce its provisions and the parties can not justly complain if the tribunal arrives at a conclusion in keeping with their acts and interpretation.

Rousch v. *Rousch,* 154 Ind. 562.
Wilson v. *Carrico,* 140 Ind. 533.
Childers v. *First Nat'l Bank,* 147 Ind. 430.

It is also contended that these contracts are valid as between these parties for the reason that they adhere to the property and pass with its title and that the purchaser at the sale was bound to know the physical facts of the roads crossing each other, and having such knowledge the law imposed the duty on the purchaser of tracing out the crossing rights acquired by the junior road at the time of construction and is bound thereby as fixed by the original owner. This contention has much to commend it, however, on account of the conclusion arrived at by the Commission it is unnecessary to determine the validity of these contracts upon that question. For the reason already given it is the opinion of the Commission that these contracts are valid as between the parties under the present conditions, but the Commission is also of the opinion that they are not effective to control this proceeding. The Commission is unable to concur in the views of the Grand Trunk Western as to its obligation to share in the expense of constructing and maintaining such protecting device as the Commission shall order for its crossing and likewise it fails to agree with both of the respondents as to their contention that these

contracts regulate the expense of operating any device which the Commission may order. So far as these contracts, if in force, regulate the expense of constructing and maintaining the crossings as designated in the contracts it is the opinion of the Commission that they will remain uneffected and unimpaired by this proceeding. The Commission does not consider that the construction of an interlocking device is the installation of a crossing within the meaning of these contracts. A railroad crossing and an interlocking plant to control the operation of trains at such crossing are entirely different structures, serving entirely different purposes. A train may, and many thousands of trains have, run this crossing without an interlocking device being in use. If this crossing is to be abandoned or supplanted only by an interlocking plant, such as the Commission may order, we apprehend that the traffic on these lines would cease at once. A crossing, as fixed by this contract, is wholly within the joint right of way of the companies and is constructed to afford passage for the trains of the respective roads and not a single rail, frog or tie will be disturbed by the installation of an interlocking device. The interlocking device is constructed for the purpose of signalling the approaching trains and indicating to them the crossing privileges as they respectively arrive at the crossing and in this particular is wholly separate and distinct from and is not connected with the tracks at the crossing now in use, but is in addition thereto and serves an entirely different purpose. In addition to the signals an interlocking device also includes a derail in each track, put in at a point far removed from the crossing, as contem-

plated by this contract, and placed there, not for the purpose of affording facilities for trains to cross, but to prevent their crossing if need be. This separate and distinct purpose attaching to a crossing and means for its protection is clearly recognized in this contract as above set forth, showing that each of these matters received separate consideration by the parties at the time. The Commission does not consider the language in such contract, which requires the crossing to be so constructed that the Grand Trunk "shall be able to operate its road at that point with convenience and safety" to include or control anything but the crossing as here defined and that the language used has its full force and effect when applied to the crossing as distinguished from the signalling and operating device provided for in the contract.

It seems to the Commission that the crossing is a part of the corpus or body of the railroad system, necessary, immovable, stationary and in charge of the track men, while an interlocking apparatus may be dispensed with entirely, and when used is nothing more than a part of the operating equipment and of no value unless controlled and in motion and is under the care of a different department of the company. Such being our present views, we are compelled to hold that this contract does not affect the question. This is not a proceeding to establish a crossing or repair one; it is a proceeding to protect the crossing now established and secure safety to life and property while being transferred over the same.

The Pan Handle's contract secures to it an equal

division of the expenses of watching the present crossing, which costs annually $900 and the Grand Trunk's contract requires the Monon to pay all the present watching expenses at its crossing, which amounts to $780 per annum, and they claim that these sums, under such contracts, should be arbitrarily charged, in the same manner, to the Monon and Pan Handle and deducted from the expense of operating the interlocking plants before any division is made on what would be the proper basis if there were no contracts. In this view the Commission can not concur, as a matter of law. At the time these contracts were entered into the only law upon the subject of railroad crossings, then in force in this state, which affects this question, was the criminal statute, prohibiting the running of railroad crossings by trains without stopping. There was then no law authorizing the use of interlocking devices at crossings. True one could have been established, but trains would have been compelled to stop at the crossing until the law was enacted providing that at crossings so protected trains might run through without stopping. We do not believe that an interlocking device, serving the purpose for which they are now used, can be held to be within the terms of the Grand Trunk's or Pan Handle's contracts as then written. It is not just to insist that a device now to be installed and established is within the terms of a contract made at a time when its installation and use, as now contemplated, would have been a violation of the criminal laws of the state. The device now to be installed is forced upon the parties by operation of law. The legislature,

exercising its police power, has seen fit, under certain conditions, to require such device to be installed for the protection of persons and property and it is not permissible for the parties to control or fix this liability by private contracts, made before the law was enacted. To so hold does not impair the obligations of any contract within the meaning of the inhibition of the Constitution as contended by the respondents, neither does it deprive any one of their property without due process of law as guaranteed by the 14th Amendment to the Federal Constitution. We find justification for the enactment of the statute under which this proceeding is brought in the fact that it operates upon public service corporations, which are the creatures of the legislative will, and, as such, are subject to the police power of the legislature, and, also, in the fact that it is the highest duty of the legislature to enact all needful laws having for their purpose the preservation of the health, morals and safety of the public. This police power vested in the people, and finding expression through the law-making body, is one of the highest and most sacred rights retained by the people and reserved to the states when the organic law was enacted. By it, when properly exercised in proper cases, the prohibitions of the Constitution, which are invoked in this case must go down. This power is a continuing one. It may be exercised to-day to meet the requirements of the times and next year the enactment may be repealed or modified, or may be re-enacted in a different form, as changing circumstances, inventions and necessities may require to preserve the health, morals or safety of the public. Parties who contract concerning matters within the

regulative police power of the state assume the risk of having run counter to what may subsequently prove to be the legislative will and when such is determined to be the case their agreements must fall before what the legislature, in its discretion, has determined to be for the benefit and security of the whole people.

It has always been accepted by the courts and administrative bodies charged with the enforcement of the law as their highest duty to uphold and enforce any valid contract entered into before the enactment of a law which is in conflict with the contract and to hold the law inferior to the contract as being within the constitutional prohibition against legislation which will impair contract obligations.

So, also, it has been their highest duty to see that no person's property is taken without due process of law as provided in the Fourteenth Amendment. There is no question but that the action of the Commission in the installation of an interlocking device at these crossings will overthrow the provisions of these contracts, in so far as they provide for signalling apparatus and watching arrangements now in use at these crossings and that the property now in use for those purposes will cease to be of value or use at these crossings. These arrangements are to be superseded by a device to be installed, under the authority and direction of the state exercising its legislative and administrative authority through the Commission, for the purpose of protecting the lives of its citizens and the servants of the railroads in the use of these crossings and for the purpose of furnishing greater security to property and facili-

tating the service of the carriers in performing their duty to the public. These purposes are all within the regulative police power of the state and their exercise can not be controlled or abridged by the constitutional provisions relied upon by the respondents, or modified, or their exercise, by the Commission under the law, controlled by private contract, entered into before the law was enacted.

Barbier v. *Connolly*, 113 U. S. 27.
Soon Hing v. *Crowley*, 113 U. S. 703.
Budd v. *N. Y.*, 143 U. S. 517.
Mugler v. *Kansas*, 123 U. S. 663.
New York v. *Bristol*, 151 U. S. 556.
Chicago R. R. v. *Nebraska*, 170 U. S. 57.
State v. *Woodward*, 89 Ind. 110.
C., C., C. & I. Ry. Co. v. *Harrington*, 131 Ind. 426.
Shea v. *City of Muncie*, 148 Ind. 14.
Cooley's Const. Limitations (7 Ed.), 833, 844.

The Commission, therefore, concludes that these contracts have no legal and arbitrary effect upon these proceedings and that the Commission, in the division of the expenses of installation, maintenance and operation, has complete authority to exercise its functions as an administrative body looking only to the situation and facts surrounding the parties uncontrolled by any prior agreements. The act of the Commission being legislative in character and on that account not being subject to appeal, it becomes the more important that its action should be justified upon principles of reason and justice and that no burden should be charged to either of these com-

panies that is not justified by the facts of the situation and which is not satisfying to the minds of just men as its proper proportion of the expense imposed by the state for the public good.

As to expense of installation and maintaining the crossing proper the contracts are effective and are not impaired by this proceeding. The apparatus now in use for guarding these crossings, is inexpensive, so much so that the parties have made no statements as to its value or loss on account of its use being superseded, and as to the Grand Trunk none of that loss will be sustained by it, and, therefore, we do not consider that the present protecting devices are factors of importance in determining the question. Therefore, it appears that the state should enforce division of the expense of installation and maintenance upon the basis heretofore indicated, *i. e.*, that of functions required for the protection of each road, and that the expense of maintenance should be apportioned in the same way, on account of the joint ownership in the property.

The safety appliances forced upon the parties by the state, by virtue of this proceeding, takes the place of and supercedes the watching expenses incurred by the companies when this proceeding was commenced, and looking to all the facts and surroundings it is the judgment of the Commission that equity and fair dealing requires that a sum equal to those expenses should be arbitrarily charged to the Monon at the Grand Trunk crossing, and equally divided between the Pan Handle and the Monon at the Pan Handle crossing and taken from the cost of operating the new device and the balance appor-

tioned between the roads upon the same basis as the expense of installation and maintenance and an order will be entered accordingly.

Wood, Comr., dissents.